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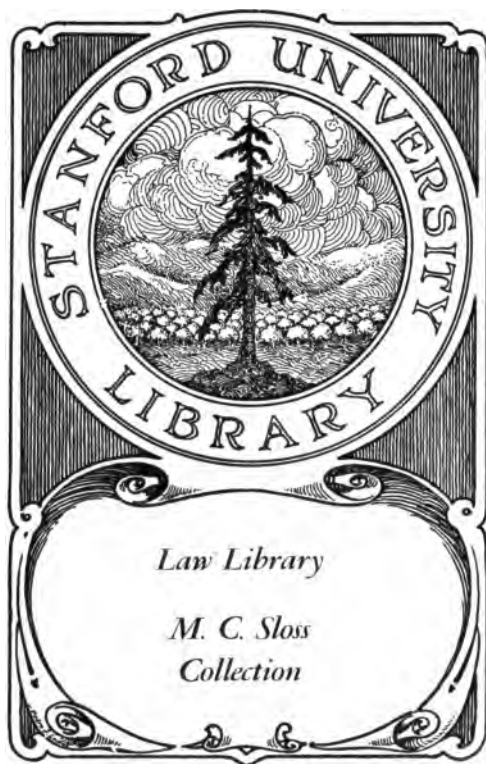
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1806



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LAW JOURNAL

FOR 1806 ;

CONSISTING OF

ORIGINAL COMMUNICATIONS ON

LEGAL SUBJECTS ;

ACCOUNT AND ANALYSIS OF NEW LAW BOOKS ,

ANCIENT READINGS, &c. &c.

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ORIGINAL COMMUNICATION.

- A Vindication of the Commentaries of Sir W. Blackstone, from some Strictures contained in Remarks on the Commentaries of Sir W. Blackstone, by J. Sedgwick, Esq. Barrister at Law* 1
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A VINDICATION
OF THE
COMMENTARIES OF SIR W. BLACKSTONE
FROM SOME STRICTURES

CONTAINED IN

Remarks on the Commentaries of Sir W. Blackstone, by J. Sedgwick, Esq. Barrister at Law.

BY A CORRESPONDENT.*

IN the first chapter of his 'Remarks on the Commentaries of Sir W. Blackstone,' Mr. Sedgwick has questioned the accuracy of many of the observations contained in the second section of the introduction to those commentaries, in which the matter discussed by the learned commentator is "the nature of laws in general;" and the first of those observations relates to the law of nature. Mr. Sedgwick, however, before he criticises Sir W. Blackstone's remarks on that law, takes an exception to some of those which have fallen from the Baron Montesquieu upon a subject which hath been discussed by him under a similar title; although it does not appear that the remarks of the latter writer, whether sound or fallacious, have even the slightest connexion with, or do in any shape affect, the arguments of the learned commentator. Indeed it will be seen, that notwithstanding both Montesquieu and Blackstone do profess to treat of the law of nature, yet, contrary to what the author of the 'Remarks' supposes, they are, in fact, speaking of very different things; for the former is speaking physically, and by the law of nature means the laws of our frame and being; whilst the latter is speaking morally, and by the same expression means the moral precepts which we are to discover by the aid of our reason, and which, as moral creatures, it behoves us to observe.

* See Law Journal for 1805, p. 255.

Montesquieu is represented by Mr. Sedgwick* to have said, "prior to *all* laws, are those of nature; so called because they derive their force entirely from our frame and being. In order to have a perfect knowledge of these laws, we must consider man before the establishment of society; the laws received in such a state would be those of nature."† But this is not a faithful quotation; for instead of 'prior to *all* laws,' Montesquieu wrote "antecedent to the *above-mentioned* laws." To have said, that the laws of nature were prior to *all* laws would have been absurd, for the expression would have amounted to this—that those laws were prior to themselves! This new modelling of the passage by Mr. Sedgwick is, however, objected to, not merely because it thereby becomes devoid of meaning, but for the reason that when it is considered in its genuine state, we are enabled to ascertain with precision what import it ought to have attached to it.

The laws of nature are said by Montesquieu to be "antecedent to the above mentioned laws." What then are the laws which he has so mentioned above? If the reader will look at the conclusion of that chapter in the *Spirit of Laws* which immediately precedes the above mentioned quotation, he will find that the laws referred to are the laws of religion, the laws of morality, and political and civil laws: then, as the laws of morality, and political and civil laws, are of the number of those to which the laws of nature are antecedent, it is indisputable, that Montesquieu does not mean under the expression laws of nature, to include either those laws which ought to regulate our conduct as moral creatures, or those political and civil laws which confine us to our duties towards our fellow-citizens. If any doubt remains, it will be removed by examining the quality of those laws of which the law of nature is said by Montesquieu to be composed. The first law of nature would be peace; the second law of nature would prompt man to seek for nourishment; the natural inclination the sexes have for each other would form a third law; and a fourth law of nature results from the desire of living in society.‡ Now here we have not

* Rem. p. 1.

† *Spirit of Laws*, b. 1, c. 2.

‡ *Spirit of Laws*, b. 1. c. 2.

one syllable of moral obligation; but the whole is evidently meant to apply to man as a physical being. But, notwithstanding such is the evident meaning of the above passage in the Spirit of Laws, Mr. Sedgwick* makes the following comments upon it: 'Is it not obvious that the reception of laws, of whatever kind, supposes the establishment of society?' The answer to which is, that as the laws spoken of by Montesquieu are those laws which concern us as physical beings only, and are *coeval with our existence*, it is not only not obvious that their reception supposes the establishment of society, but it is perfectly clear that they existed previously to any such establishment, and before the existence of laws political and civil. He observes also,† 'If it is intended to affirm, that those motives, which should be observed to determine the actions of itinerant and solitary savages, would be the laws of nature, the assertion is inadmissible. The speculative moralist would be little aided in his inquiry into the originary principles of those laws, by ranging the waste and becoming a spy on the conduct and economy of brutes; and *men in their uncivilized condition are all but quadrupeds*. As well might we expect to acquire an adequate conception of the power and attributes of the great Sovereign and Father of the universe by exploring the systems of superstition that prevail in the darkest corners of the earth, as to trace out the elementary principles of ethics in the pursuits of barbarians, acting from the caprice of the moment guided by their appetites, and governed by their passions.' Now, for the reasons already advanced, it is plain that Montesquieu is totally misunderstood by Mr. Sedgwick, who supposes him to be treating of ethics or the laws of morality; but although there is nothing even offered against the *true* signification of the passage in question, there is one observation which must not be suffered to pass uncontradicted. To assert of uncivilized man, that he is *all but a quadruped* is a libel on human nature. Were the patriarchs who in the primitive ages lived out of a state of civil society, distinguished from a horse or an ass only by their being bipeds? In no part of the known world is man in a state so degraded as to be justly considered a mere brute;

* Rem. p. 2.

† Ibid.

for he is endued with the faculty of acquiring knowledge, which a brute is not. In a barbarous condition man is not seen in a state of nature, but in a state of degradation.

Mr. Sedgwick then proceeds to criticise the observations of Sir William Blackstone upon the law of nature, and having quoted the following passage, "As man depends upon his Maker for every thing, it is necessary that he should in all points conform to his Maker's will; this will is called the law of nature,"*—asks, 'what conclusive evidence, what explicit manifestation have we of this law? From what source are we to derive our knowledge of the rules it has prescribed? Are they to be found in the axioms and apothegms delivered by the prudent and digested by the wise? Do they take rise in the arbitrary transactions of mankind?'† And to all these questions, he makes the learned commentator answer in the negative, by extracting the following passage from a future page of the Commentaries, that "they were founded in those relations of justice, that existed in the nature of things antecedently to any positive precept." This indeed would have been a vague and unsatisfactory answer had it been given with a view to the manifestation of the law of nature, which it was not, as will be presently seen. It is extraordinary that that passage should be adduced, when in the very one next succeeding, Sir W. Blackstone expressly says,‡ with respect to the law of nature, that the laws which the Creator hath prescribed to his creature man, "are the eternal immutable laws of good and evil, to which the Creator himself in all his dispensations conforms; and which he has enabled human reason to discover as far as they are necessary for the conduct of human actions." The learned commentator's observations then are not of that empty nature which the author of the 'Remarks' would represent; for, we collect from them, that it is by the due exertion of right reason, aided by divine revelation,§ that we are to derive our knowledge of the rules prescribed; and to obtain conclusive evidence and an explicit manifestation of this law. Nay, Sir W. Blackstone has even enume-

* Com. v. 1. p. 39.

† Rem. p. 2.

‡ Com. v. 1, p. 40.

§ Ibid. 41, 42.

rated the three general principles of it, that we should live honestly, should hurt nobody, and should render to every one his due—principles so comprehensive that the whole doctrine of law was, in the opinion of Justinian, reducible to them. It certainly is a mode of disputation, not entitled to much commendation for its candour, which thus conceals from the reader what was really advanced for the purpose of pointing out in what the law of nature consisted; and, at the same time, condemns as unsatisfactory in that respect, observations which never had any such object in view.

It is in order to vindicate the wisdom of the Creator, that Sir W. Blackstone says, "he has laid down only such laws as were founded in those relations of justice that existed antecedent to any positive precept." In reply to this passage, Mr. Sedgwick contends,* that 'laws could not exist antecedently to any positive precept;' and that they 'could not precede in existence the agent whose actions they were expressly intended to controul.' All of which may be conceded to him without shaking the accuracy of Sir W. Blackstone's observation; for the learned commentator does not mean that the laws existed antecedently to any positive precept, but that the relations of justice did so exist, and that the laws were founded in, and are consistent with those relations; the words "*that existed*" referring to the existence not of the laws, but of the relations of justice. But the writer does not stop here; for he appears to deny that the relations of justice could have existed before any positive precept, or before the appearance of injustice amongst men. 'With respect to the pre-existing relations of justice,' he observes,† 'it may be remarked, that it is not until the appearance of injustice, that the idea of justice is impressed upon the mind. In the commerce of fallible beings with each other, those who suffer *wrong*, connecting and comparing the consequences of an opposite conduct, gain the correlative perception of *right*.' But this is nothing like argument to prove that the relations of justice were not pre-existing. That gentleman himself must surely admit, that before any unjust or wrongful action had appeared in the world, there was a *possibility* of its appearing;

* Rem. p. 3.

† Ibid.

and looking to that possibility, we should have thought and said, if such an action takes place it will be unjust and wrong. It seems then, that we might have had an idea of justice, before the actual appearance of injustice; or if our minds might not have possessed such an idea, it is at least clear, that the relations of justice must have existed; for as to the ideas being impressed upon our minds, it goes to our perception of the thing, not to the thing itself. "Before laws were made," says Montesquieu, "there were relations of *possible* justice. To say "that there is nothing just or unjust, but what is commanded or forbidden by positive laws, is the same as saying, that before the describing of a circle all the radii were not equal. We must therefore acknowledge "RELATIONS OF JUSTICE, *antecedent to the positive laws* by which they are established."*

Had the discovery of the first principles of the law of nature depended upon the due exertion of right reason only, mankind would, according to Sir William Blackstone, have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence; but a sufficient inducement was supplied, for, "The great Creator has," says the learned commentator,† "intimately connected and inseparably interwoven the laws of eternal justice with the happiness of each individual; and in consequence of that mutual connexion of justice and human felicity, he has reduced the rule of obedience to this one paternal precept, 'that man should pursue his own true and substantial happiness;' still, however, he adds, it is necessary to have recourse to reason to discover what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness." So that in ascertaining what will conduce to our real and permanent felicity or substantial happiness, we at the same time discover what the law of nature or the rule of right, in that particular enjoins; and are stimulated and encouraged to make such discovery, not simply that we may know what the law of nature directs, but that by following it we may obtain felicity eternal.

* Sp. of Laws, b. 1, c. 1. † Com. v. 1, p. 40, 41.

Having taken this general view of Blackstone's observations upon this subject, it becomes necessary, in the next place, to take notice of the objections which have been made by the author of the 'Remarks' to the following passage, which forms a part of those observations. "Infinite goodness has been pleased so to contrive the constitution and frame of humanity that we should want no other prompter to inquire after and pursue the rule of right, but only our own self love, that universal principle of action."* Those objections are, that† "It is the essence of a rule of right to be constant and determinate: but were the rule to depend for its discovery, or observance, on the insinuations of self love, its character would be destroyed; the ends to be pursued, and the mode of pursuing them, would be as multiform and opposite as the disposition, tastes, and appetencies of individual men." Now it seems to me that the learned commentator hath been strangely misunderstood; for it is not meant that mankind by following the dictates of self love in the gratifications of their several tastes and appetencies, would at the same time pursue the rule of right; for assuredly the insinuations of self love, and the injunctions of the rule of right, would often be in opposition to each other; but his meaning obviously is, when (as it ought always to be) the context is considered, that as by conforming to the rule of right we shall obtain substantial happiness, we are therefore prompted to inquire into and pursue that rule by our own self love; and having substantial happiness in view, it will not, it is believed, be disputed, that if many individuals, however opposite their dispositions, tastes, and appetencies may be, are pursuing that line of conduct which will qualify them for substantial happiness, they will at the same time be pursuing the rule of right. The rule of right therefore may remain constant and determinate, and its character not be destroyed, although mankind in general may conform to it from the principles of self love.

Mr. S. continues to observe,‡ that 'admitting that this precious principle will induce the observance of this rule, does it lead to the discovery of it? Either the suggestions of self love and the rule of right must be identical,

* Com. v. 1, p. 40.

† Rem. p. 4.

‡ Rem. p. 5.

'or we need some other guide to conduct our inquiries, 'and must seek out some higher authority to instruct and 'controul our will.' The answer to these remarks has been, in part at least, anticipated by some preceding observations; but we will, notwithstanding, briefly observe in this place, that the whole tenour of the learned commentator's argument is, that self love constitutes the stimulus which is to prompt us as well to institute an inquiry what the rule of right prescribes, as to pursue that rule when discovered; that, not our self love, but our reason is to be the guide to conduct us in making that inquiry; and that *this* has been graciously made the object of it. 'What method will tend the most effectually to our own "substantial happiness?" For in ascertaining and pursuing that line of conduct which most effectually tends to our permanent felicity, we at the same time ascertain and pursue the rule of right, and act in conformity to the dictates of the law of nature, by reason that the laws of eternal justice and the happiness of each individual are inseparably interwoven. It is not, however, the opinion of Sir William Blackstone that the discovery of what is likely to conduce to our substantial happiness would have been attainable by our reason alone in its present degenerate state without the help of revelation, as we shall have occasion to remark in a future page.

But it is denied that self-love is the universal principle of action. 'To suppose,' says Mr. Sedgwick, 'self love to be 'the universal principle of action, is to suppose it equally 'predominant over all minds, which it is not: if it were, 'the merit even of our best actions would be destroyed by 'the meanness of their motive; the praise of magnanimity, the glory of liberal and *disinterested* proceeding, 'would be lost.' Here then we are not favored with any thing like reasoning against the position itself, but it is merely affirmed that a particular consequence will result, supposing it to be correct; that is, that the merit of our best actions would in that case be lost. It is a very common thing for visionary writers, whose opinions of the nature of man are founded merely upon the dogmatism of certain theorists, unassisted by actual observation of his real character, to speak of *disinterested motives* and *disinterested proceedings*. It is one of the fine spun, but unsubstantial speculations of the closet. Man is invariably incited to action by some impelling motive, and feels an interest in

the accomplishment of whatever is the object of that motive. Without being in some way or other interested, he remains in a state of inactivity. No very deep penetration into human nature, nor acute discernment with respect to the motives of mankind, is required to discover, that it is the circumstance of their own happiness being concerned that stimulates individuals upon every occasion; and consequently, that self love is the universal principle of action, whether it seeks its gratification in the mental satisfaction arising from the performance of good offices towards others, or in the gross indulgence of our sensual appetites and passions. But although the principle of self love is concerned in every action, it surely does not follow that all actions are in point of merit or worthlessness the same. It does not follow that 'the merit of our best actions would be lost.' On the contrary, it is contended, that if the prevalence of the principle were universally admitted, great actions would then, as now, obtain universal commendation and applause. The man of transcendent desert would not, it is true, be complimented for his absolute disinterestedness, but there would not be withheld from him what would be no less honorable—an admiration of that elevation, that sublimity of soul, which stifling all petty feelings, prompts him to look for the gratification of his self love in the conviction of his having contributed, or zealously endeavoured to contribute, to the honour of his country; and the amelioration of the condition of his fellow creatures. The magnanimity or baseness then of any particular action does not depend upon the absence or presence of the principle of self love, but upon the nature of the actions themselves in which it seeks its gratification. If the probable tendency of those actions will be to benefit others, they would still be deemed noble. If confined to the gratification of some worthless passion, they would still be considered disgraceful. But Mr. Sedgwick himself afterwards* incautiously concedes all that he has here opposed, as well in citing with approbation from Burlamachi, that "*what every man does is with a view of happiness*, and that is the *ultimate end* which he purposes in "*all his actions*," as in saying, in another place,† "*happiness is confessedly the great pursuit of mankind*; it is the

* Rem. p. 7.

† Ibid, p. 8.

'*prospect of obtaining it that gives vigour and persistency to all their enterprizes.*' Why if happiness be the ultimate end which every man purposes in all his actions, if it be the prospect of obtaining happiness that gives vigour to all their enterprizes, is it not tantamount to the position of Sir William Blackstone, that self love, or the desire of being happy, is the universal principle of action?

Our author had already told us, remarks Mr. Sedgwick, that—"As God, when he created matter, and endued it with "a principle of mobility, established certain rules for the "perpetual direction of that motion; so when he created "man, and endued him with free will to conduct himself "in all parts of life, he laid down certain immutable laws "of human nature, whereby that free will is in some "degree regulated and restrained, and gave him also the "*faculty of reason* to discover the purport of those laws." But, says that gentleman,* 'had the make and frame of 'humanity been from the beginning so *contrived* that we 'need no other prompter to inquire after, and pursue the 'rule of right than our own self-love; in this case, to 'have laid down the immutable laws of good and evil, and 'to have bestowed on man the high and inestimable endowment of reason, that we might thence be enabled to 'discern their utility, and ascertain their design, would 'clearly have been superfluous.' Now so far from being superfluous would be the faculty of reason, that it would be indispensable; for it is not meant by Sir William Blackstone that we should be pursuing the rule of right in listening to every dictate of self love, but that our self love is to urge us to inquire after the rule of right by considering what will tend to our substantial happiness and that the faculty of reason was given us, as being absolutely requisite to be resorted to, in order that we might be enabled to pursue that inquiry with success.†

Mr. Sedgwick continues, 'If, on the other hand, those 'express immutable laws, and the deliberate exertion of 'reason in the application of them, lead to the development of those duties which universal justice demands, 'then ought the duties thus discovered, and not the teachings of self love, to decide on our conduct and govern our 'pursuits.'‡ To be sure they ought. It is conformable to

* Rem. p. 5, 6.

† See ante p. 6, 7, 8.

‡ Rem. p. 6.

the learned commentator's own idea, which was precisely and simply that the duties thus discovered ought to govern our conduct; that self love is to prompt the inquiry what those duties are; and that as soon as it is ascertained what our duty in any particular circumstance of life is, whether it is a duty that attaches to us in a social or other relation—it behoves us to conform to it if we would attain substantial happiness.

In commenting upon the alleged precept, “that man should pursue his own true and substantial happiness,” it is remarked* that ‘real and substantial are relative terms, and infer somewhat that is false and fugitive, which contrariety again implies certain criteria, by which they may be distinguished; that in reply to that urgent and interesting inquiry, What is happiness? the rationalist can do no more than point, like Anaxagoras, with his finger to the heavens,’ and that ‘after all, as happiness is an end, it is essential that *the means* of attaining it, the duties with the performance of which it is connected, should be previously made known.’ Certainly the words real and substantial are relative terms, and no less certain is it that those terms are with the utmost propriety made use of by Sir Wm. Blackstone, when alluding to our future and permanent felicity in contradistinction to pleasures fleeting and illusory. With respect to the means of attaining real and substantial happiness, they consist in discharging our duty by obeying the injunctions of the divine will; and although the rationalist may not be able to define what happiness is, he would not probably be at a loss to decide whether any particular line of conduct has a tendency to promote or lessen our claims to it. He would not hesitate to avow that the means of attaining it are to act in conformity to the divine commands. How far the fallibility of our reason would be an obstacle will be very soon considered.

Mr. Sedgwick proceeds to observe,† that, ‘When we come to apply this command to the practice of life, every one must be the judge of his own happiness: it follows, then, that the value of the rules of duty, and of the immutable laws prescribed for his direction, are to be estimated by the degree of happiness which our conformity to

* Rem. p. 7.

† Ibid. p. 8.

'them may occasion. But are not,' he asks, 'the distinctions of right and wrong connected with the different ends and pursuits which a regard for our own felicity may dispose us to prefer or reject?' The answer to which is, that if the happiness spoken of by Sir W. Blackstone were the transient pleasures of this life, mankind might estimate the value of the rules of duty, in proportion as their observance would contribute to their present gratification; but, as that happiness is the pure and permanent felicity of a more exalted state, as well as unqualified, the quantum of their value cannot be a question. Considering them as guides to our true and substantial happiness, they are above all price. In answer to the concluding question, it is to be observed, that such being the kind of happiness meant, the distinctions of right and wrong are not merely connected with our different ends and pursuits, but it is essential that those ends and pursuits do square with those distinctions.

It is said also,* that 'this precept, as it here stands, has this of obliquity in it, that it makes self the sole object of every one's concern: and teaches us to prefer and pursue good, not for its own sake, and in pursuance of the divine command, but because it promises most to our interest, and conduces most to our pleasure.' Now, so far from the truth is this statement, that whoever acts upon the spirit of the precept, instead of considering what conduces most to his interest and pleasures in this life, must often forego them, for, as Mr. Sedgwick himself quotes from Dr. Johnson, in the following passage, "the future is purchased by the present. "It is not possible to secure distant or permanent happiness" (which is the happiness that Sir W. Blackstone speaks of,) "but by the forbearance of some immediate gratification." To qualify himself for permanent happiness every man is required to discharge his relative and social duties, but that cannot be done without consulting the happiness of others; or, to use the language of the Remarks;† 'there is a happiness, *not our own*, to be consulted, and which may even demand that our own' (that is, our happiness in this life) 'should be sacrificed.' This precept, therefore, does not make self the sole object of every one's

* Rem. p. 8.

† Ibid.

concern. '*Self-denial*,' says this writer* 'is enjoined among the most authoritative of christian duties. It is obvious, then, that happiness may be pursued and enjoyed at the expence of our duty, since it is in the postponement of the former to the latter, in cases wherein they oppose each other, that the austere and arduous virtue of self-denial consists.' Certainly, happiness—if by the term is meant the fleeting pleasures of this life—is too often pursued and enjoyed at the expence of our duty; but in the pursuit, and in order to the enjoyment, of that true and substantial happiness to which the learned commentator alludes, our duty must be faithfully discharged. There is no absurdity in the expression, that self-love should urge us to self-denial.

Some further remarks are then offered, from which is deduced the following conclusion: 'It appears, then, that this grand precept, which the law of nature is here made to assume for its foundation, supposes *the doctrine of a future state, together with all the promises and denunciations of scriptural REVELATION*, to be already communicated; since it is thence alone that we discover in what it is that solid and substantial happiness essentially consists, by what means it is to be pursued, and on what terms to be obtained.† Now if we were not to examine further, some who have not studied the Commentaries might be tempted to infer Sir W. Blackstone's doctrine to be, that our reason in its present state would alone have been competent as well to discover the truths which have been revealed to us, as to ascertain in what solid and substantial happiness consists: but the sum of his observations is, that reason would, *had it continued, as it was received*, pure from the great Creator, have been competent to discover those things, a knowledge of which, in the present degraded state of our reason, is not obtainable but by the aid of the scriptures: in other terms, that scriptural revelation is but a discovery of those truths which the due exertion of right and uncorrupted reason would have disclosed; and that direct revelation became necessary only because that reason was rendered corrupt by the transgression of our first parents. "We are not to conclude," says the learned commentator,‡

* Ram. p. 9. † Ibid. p. 10. ‡ Bl. Com. v. 1, p. 41, 42.

“ that a knowledge of these truths was attainable by reason, “ in its present corrupted state ; since we find, that until “ they were revealed they were hid from the wisdom of “ ages.” So again, after stating that it is the office of reason to discover what the law of nature directs in every circumstance of life, he adds,* “ And if our reason were always, “ as in *our first ancestor before his transgression*, clear and “ perfect, unruffled by passion, unclouded by prejudice, “ unimpaired by disease or intemperance, the task would “ be pleasant and easy : *we should need no other guide but “ this.* But every man now finds the contrary in his own “ experience ; that his reason is corrupt, and his understanding full of error. This has given manifold occasion for the benign interposition of Divine Providence ; “ which, in compassion to the frailty, the imperfection, “ and the blindness of human reason, hath been pleased, “ at sundry times and in divers manners to discover and “ enforce its laws by an immediate and direct revelation.”

It is, in the next place, asserted, that, ‘ in pursuing the distinction between religion and morality, the learned commentator does not evince his usual perspicuity ;’ and the following passages from the Commentaries are given, as being confused and inaccurate : “ The law of nature “ being coeval with mankind, and *dictated by God himself*, “ is of course *superior in obligation to any other.*† As “ the precepts of the revealed law are of the same original with those of the law of nature, so *their intrinsic “ obligation is of equal strength and perpetuity.*”‡ ‘ Having thus,’ says Mr. Sedgwick,¶ ‘ declared them coessential, and of equal authority, as proceeding from the same ‘ divine mind, and tending in all their consequences ‘ to the same rightful end, he concludes with affirming,§ that “ Undoubtedly, *the revealed law* is of infinitely more authenticity, than that moral system which “ is framed by ethical writers, and denominated *the natural law.* Because one is the law of nature, expressly declared so to be by God himself ; the other is only what “ by the assistance of human reason, we imagine to be “ that law. If we could be as certain of the *latter* as we

* Bl. Com. v. 1, p. 41, 42. † Ibid. p. 41. ‡ Ibid. p. 42, Rem. p. 11. § Bl. Com. v. 1, p. 42.

"are of the *former*, both would have an equal authority; "but till then, they can never be put in any competition "together." Now, however confused the above passages may appear when transported to the pages of Mr. Sedgwick, the meaning of them, as they stand connected with other observations in the Commentaries, is clear and consistent; for the learned commentator states,* that "the precepts "of the revealed law are found upon comparison to be "really a *part* of the original law of nature, as they tend "in all their consequences to man's felicity." It is evident then, that the law of nature and the revealed law are equal in point of strength and perpetuity, and that they are superior in obligation to all other laws. Ay, say they who are disposed to cavil, but notwithstanding that they are said to be equal, one of them is at the same time declared to be of infinitely greater authenticity than the other. There is not, however, any such inconsistency; for those laws which are said to be *equal*, are the revealed law and the *actual* law of nature; but, that, to which the revealed law is said to be superior in point of authenticity, cannot be pronounced with certainty to be the law of nature, for it is, "that moral system framed by ethical writers, and what, by the assistance of human reason, we *imagine* to be that law."† Now, considering the fallibility of that reason, it is possible that that system may be erroneous; and may be in oppugnancy to the actual laws of nature; consequently the revealed law must be of infinitely more authenticity than that system which ethical writers have denominated the natural law. In truth, it seems to me, that the very quotations which the gentleman has himself made from the Commentaries, shew, that the meaning of the learned commentator was as above represented; for it is said, "if we could be as *certain* of "the latter as we are of the former; both would have an "equal authority."

If it had been so desirable a thing to have taken exceptions of the above nature, it is rather to be wondered at, that one so unsubstantial should have been made choice of, when there is an observation in the very sentence extracted which really does appear to lie open to a little criticism. The learned commentator says, "If we could

* Bl. Com. v. 1. p. 42.

† Ibid. p. 43.

"be as certain of the ethical system being the law of nature as we are that the revealed law is, both would have an equal authority: but, till then they can never be put in any competition together." To my view, however, it seems clear, (although I must at the same time beg to be understood as speaking, even upon so trivial a subject, with all due deference) that if they can be put in any competition at all, it must be "*till then*," viz. whilst it remains uncertain whether both the one and the other are the law of God or not; for afterwards, when it is ascertained, that they are both the law of God, or one and the same thing, they then surely cannot be put in any competition. But the learned commentator's meaning may easily be learnt from the context to be this, that the revealed law is of an authenticity so vastly superior to the system framed by ethical writers, and by them imagined to be the law of nature, that the latter cannot be put in any competition with the former, and an exception so unimportant would not certainly have been taken under any other circumstances.

Sir W. Blackstone having said,* that "if man were to live in a state of nature, *unconnected with other individuals*, there would be no occasion for any other laws than the *law of nature* AND the *law of God*," Mr. Sedgwick observes,† 'Our author has already affirmed, in express terms, that the law of nature is the will of God. Either then the will of the deity and his laws must be at variance with each other, or the law of nature and the law of God must be synonymous. But admit for a moment that these laws are different and distinct systems, is it not self-evident that both the one and the other would be uselessly imparted to man, existing in the unsocial and disconnected condition above described.' We are not compelled to choose between the alternative which is above offered to us, for accurately speaking, the law of nature and the law of God are neither synonymous, nor at variance with each other. There is no question as to the *real* law of nature and the law of God, being both from God; and that the law of God or revelation is a part, and only a part, of the real law of nature. They therefore cannot be at variance, nor are they synonymous.

* Bl. Com. v. 1, p. 43.

† Rem. p. 12.

If the learned commentator had even meant the *real* law of nature therefore, the expression might have been defended. But it is contended that he ought not to be understood to speak of the real law of nature; for beyond so much as hath been actually revealed to us, we can be upon no certainty that the law of nature is in fact what our reason leads us to suppose it to be. What he means by the law of nature differs from the law of God in this respect—the precepts of the law of God or of revelation have been expressly discovered to man by God himself: whereas what we denominate the laws of nature have not the sanction of positive revelation; but are merely the suggestions of our own fallible reason; and which may be either the law of nature or not as our reason happens to be sound or fallacious. This material distinction in point of authenticity, it has been the learned commentator's object to make throughout the whole discussion; and it was therefore judicious in him to preserve it in the above passage, rather than to permit his reader to lose sight of it by including both under one general expression. Had the learned commentator used the same expression as he had done in the preceding page, and instead of the law of nature and the law of God, had said the law of nature and the law of revelation, even hypercriticism itself would not have found in it any thing to carp at. With respect to the question, whether 'both the one and the other law would not have been uselessly imparted to man existing in the unsocial and unconnected condition above described,' it is answered, that even in such a state the precept not to molest another in the enjoyment of his natural rights might not be altogether useless. Would the command—Thou shalt not kill, be uselessly imparted; and its observance or non-observance a matter of indifference! Certainly, in an uncivilized condition man would have no scope for the performance of civil duties; but still there would be natural duties for him to observe notwithstanding that there might be no civil intercourse. It surely can need no argument to manifest the truth of this.

Mr. Sedgwick then proceeds to give another passage from the Commentaries: * "But man was formed for society; and, as is demonstrated by writers on this sub-

* Bl. Com. v. 1, p. 43.

“ject is neither capable of living alone nor indeed has the courage to do it,” and follows it up with the following criticisms.* ‘If man was formed for society, the social state must be the legitimate and genuine state of his nature. The learned writer’s propositions, therefore, contradict each other; he first describes that as the *state of nature* in which man, isolated and solitary, lives unconnected with other individuals; but he presently tells us, that man was formed for society, and is incapable of living alone. How then can man be said, consistently, to be in a state of nature, when in a state for which nature did not design him, to which avowedly he is not adapted, and in which he cannot live.’ Now it never was the learned commentator’s opinion that man was designed by nature to live in an isolated state, for he will be found to say in express terms in a future page, that “he does not believe that there ever was a time when there was no such thing as society either natural or civil, and that the notion of an *actually existing* unconnected state of nature, is too wild to be seriously admitted.” In saying “if man were to live in a state of nature unconnected with other individuals,” the learned commentator was supposing a case—was contemplating not an actually existing but an imaginary state—was presuming that man continued in one state, although formed for another. No other supposition can in reason be entertained when it is observed that immediately after he adds,—“But man was formed for society, and is incapable of living alone.” But then it will perhaps be said, it is plainly to be inferred from the expression to have been the learned commentator’s opinion, that in an isolated state, man is in that very state in which he was by nature destined to live; but that is not a necessary implication, for, in the first place, had the words ‘state of nature,’ fairly implied or had they been thought by him to imply so much, the additional words ‘unconnected with other individuals,’ would have been superfluous; and secondly, a state of nature may signify, (and, as used in the above sentence, can have no other signification than), that state in which he came from the hand of nature, that is, a creature formed for society; but it is one thing to be

* Rem. p. 13.

† Bl. Com, v. 1, p. 47.

formed for or with a disposition towards any particular state; and another and very different thing actually to be in that state. Man, then may correctly be said to be in a state of nature when he remains in the state in which nature left him, that is, *inclined* to the social state, but as yet *not actually entered* into it. To conclude, nature implanted in him motives for associating with others of his kind; but she did not form a creature actually civilized. But Mr. Sedgwick; to make any thing of his argument, must contend, that because man was formed *for* society, an existence *in* a state of society must at all events be intended by the expression 'a state of nature:' it follows, then, that the expression that "man is in a state of nature when unconnected with other individuals," and "that he was formed *for* society," may stand well enough together: for the former of those expressions does not involve any such consequence as that the state thereby alluded to is that 'genuine and legitimate' state in which he was intended by nature to continue to live and move.

Mr. Sedgwick, after a few remarks on some passages in the Spirit of Laws, which will presently be taken notice of, asserts* that 'conformably with the hypothesis of Montesquieu, Sir William Blackstone, proceeding to inquire 'concerning the nature and origin of society and civil government, informs us that "the *only* true and natural foundation of society is the *wants* and the *fears* of individuals:"† But it is certain that the meaning of Montesquieu hath been much mistaken. It is true, that in the chapter referred to‡ he speaks of the wants and fears of men, but not with the view of showing that they are the only true and natural foundation of society. He will be found to be speaking of those laws which derive their force *entirely from our frame and existence*; and not of any motives or inducements which are supposed to have sprung up upon a perception of our necessities. What does he say respecting our wants? That they stimulate man to enter into society? No: but that they would prompt him *to seek for nourishment*. What of our fears? That the impression of fear would induce him to associate with the object that inspires it? No: on the contrary that he would shun that object. "Fear," says he,§ "would induce men to shun one

* Rem. p. 14.

† Com. v. 1, p. 47.

‡ Spirit of Laws, b. I, c. 2.

§ Ibid.

"another; but the marks of this fear being reciprocal, "would soon engage them to associate." Montesquieu, however, is not to be understood to mean, that this reciprocation of the marks of fear constitutes the chief inducement towards association. They must be taken rather privatively than positively, rather as the removal of an obstacle in the way of an association to which men are naturally inclined—than as an original motive to such association; for he considers man as formed to live in society, and by the laws of their frame and being to have an inclination for the social state. Nay, he concludes that one of the laws of nature results from the desire of living in society.

Having attempted to shew that Montesquieu did not, in speaking of the wants and fears of individuals, mean to attribute to *them* the origin of society and civil government, it will, in the next place, be contended, that in no part of the Commentaries is it said, nor from any part can it be inferred to have been Sir William Blackstone's opinion, that society had its origin in the wants and fears of individuals: nor indeed that the wants and fears of individuals are the foundation and cement of civil society in the sense which the Author of the 'Remarks' attaches to those words 'wants and fears.' With respect to society having originated in those wants and fears—so very different was the opinion of the learned commentator, that he expressly says* that "single families formed the first natural society, among themselves; which, every day extending its limits, laid the first, though imperfect rudiments of civil or political society." Indeed he actually avows his disbelief in the very next sentence to that which Mr. Sedgwick has quoted, that "through a sense of their wants and weaknesses individuals met together, and entered into an original contract." That gentleman therefore had no grounds to infer that in Sir William Blackstone's opinion society originated in the wants and fears of individuals; nor was he justified in declaring† a subsequent remark of the learned commentator, that "society had not its formal beginning from any convention of individuals actuated by their wants and their fears," to be an abandonment of his postulate. This last passage ought rather to have pointed out to the writer the error

* Com. p. 47.

† Rem. p. 15.

into which he had fallen in misapprehending the signification of the preceding observations in the Commentaries, with which it is strictly in unison.

Although, however, it appears to have been the learned commentator's opinion, that civil society sprang out of, and that its first rudiments were laid in natural society; yet he considered; that the only true and natural foundation of civil society was the wants and fears of individuals. "It is," says he,* "the *sense* of their weakness "and imperfection that *keeps* mankind together; that "demonstrates the necessity of this union; and that "therefore is the solid and natural foundation, as well as "cement of civil society." So that in the learned commentator's opinion, mankind, being previously united in a state of natural society, were induced to remain—were kept—together from a sense of their weakness and imperfection, or in other words, from their wants and fears, and to submit to the regulation and restrictions of civil society.

But it is necessary to observe, that the author of the 'Remarks' has totally misapprehended the sense in which the learned commentator uses the words *wants and fears*, for he supposes that they have the same meaning which they bear in the above passages in Montesquieu. Thus in commenting upon the passage containing those words, Mr. Sedgwick says,* that 'the wants of mankind in the first stage of their progress are supplied 'by the bounty of nature; and that every individual 'is competent to procure for himself such supplies 'as his subsistence in this confined and simple state requires.' And 'with respect to their fears,' he observes, that 'the apprehension of harm excites rather to avoid than approach the object that inspires it; that far from connecting man with man, it tends to dissociate him from his kind.' Whereas by wants, Sir W. Blackstone means the want of the protection of the strong arm of society. And by fears, the apprehension of insecurity but for that protection. This will further appear from the positions which we shall next be called upon to defend: and such being his meaning, it is unaccountable that he should have been supposed to employ those words in the same sense with Montesquieu, who means those wants which prompt man to seek for nourishment, and those fears which must at first have induced men to shun each other.

* Com. v. 1, p. 47,

† Rem. p. 15.

But still more strange is it, that their having used those words in different significations, and that too when not considering the same subject, should have led the writer to conclude, that the learned commentator's doctrine with respect to the nature of civil society, was in conformity to the hypothesis of Montesquieu, on the subject of the laws of our frame and being. The present subject will here be dismissed with the remark, that when the learned commentator's observation is accepted in its genuine and obvious import, there is nothing in the criticisms of Mr. Sedgwick with respect to it which are calculated to shew that it contains even the slightest degree of inaccuracy.

Speaking of the original contract of society, Sir W. Blackstone observes,* "This is what we mean by the 'original contract of society; which, though perhaps 'in no instance it has ever been formally expressed in the 'first institution of a state, yet in nature and reason must 'always be understood and implied, in the very act of 'associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the 'community should guard the rights of each individual 'member, and that (in return for this protection) each 'individual should submit to the laws of the community; 'without which submission of all it was impossible that 'protection should be extended to any." Upon the passages last extracted the Author of the 'Remarks,'† makes some observations in support of the conclusion that 'on the primitive institution of government, no original contract would be made nor any of those stipulations entered into, which suppose the precise objects of civil polity to be antecedently defined, and the abuses to be guarded against, previously known.' But admitting this position to be true, it does not affect the doctrine of the learned commentator, who expressly says, that "perhaps in no instance 'has such original contract been expressed at the first institution of a state." Neither does he suppose the precise objects of civil polity to be antecedently defined, nor any stipulations entered into respecting them; for he is only stating the main object and fundamental principle of all civil associations, that "the whole should protect all its parts

* Com. p. 47, 48.

† Rem. p. 16, 17.

"and every part pay obedience to the will of the whole." With respect to this principle, however, it is said* in a note that 'if this be true, the understood terms of the original compact are palpably reversed. In the actual state of civil government,' says he, 'we find a part protecting the whole, and the entire body paying obedience to the will of a comparatively inconsiderable number.' But is it not obvious, that in paying obedience to such inconsiderable number, each individual of the entire body pays obedience to the will of the whole, inasmuch as for the purposes of government the whole have ordained that obedience should be paid to those few; and have to them delegated and entrusted the means to be employed for the general protection; for we are not speaking here of usurpations, but legitimate governments.

'It cannot escape observation,' continues Mr. Sedgwick,† 'that the argument here used (by Blackstone,) to elucidate the nature and rise of civil government, and of what is termed "the natural inherent right that belongs to the sovereignty of a state, wherever that sovereignty belodged, of making and enforcing laws," go in their conclusion to prove that *no right of any such nature really exists.*' Now, if that actually be the case, the learned commentator's judgment must in a most extraordinary manner have misled him. His position is in substance thus opposed—'If it were a natural and inherent right, it would be our duty to acquiesce, although the supreme power should persist in invading our property, and infringing our rights: but, inasmuch as so "imperious and grinding" an authority, would be a violation of the compact by which that sovereignty was vested, the right grounded upon it would be annulled, and we should be absolved from the correspondent duty resulting from it; and hence it is concluded, that the right to make and enforce laws is not natural and inherent as the learned commentator asserts, but qualified and conditional.' Now, it will be our endeavour to shew; first, that the right is natural and inherent in the sovereignty of the state; and, secondly, that although natural and inherent, it yet does not justify the exercise of an imperious and grinding authority, because that sovereignty itself is not absolute but qualified and conditional. With respect to the first, we

* Rem. p. 16.

† Ibid. p. 17.

would ask in what the sovereignty of a state consists, if it be not in the very power of making and enforcing laws? The learned commentator accurately says,* that "sovereignty and legislature are convertible terms: "one cannot subsist without the other." And again, in another place, it is said,† "By the sovereign power, is "meant the making of laws; for wherever that power "resides, all others must conform to, and be directed by "it, whatever appearance the outward form and administration of the government may put on." Then, if these observations be correct (and Mr. Sedgwick does not, nor it is believed will any other person, question their accuracy) it seems to follow, that in the sovereignty of states, there is a right existing in and inseparable from the very nature of sovereignty; in other words, a natural inherent right belonging to such sovereignty, wherever that sovereignty is lodged, of making and enforcing laws.

With respect to the second point, it must be admitted, that the sovereignty is not absolute in the hands of those to whom it is intrusted, so as to justify an abuse of that trust; or to bind the subject to acquiesce in an imperious and grinding authority: but although the sovereignty is not absolute, but qualified and conditional, still, during its continuance, there exists in it a natural and inherent right of making laws; for the right, as it respects those who are to be bound by the exercise of it, is qualified in the same manner as is the sovereignty itself, in virtue of which that right subsists; but the right, as it relates to that sovereignty, which is the learned commentator's meaning, is natural and inherent. When the sovereignty ceases, the right ceases also. The one cannot possibly exist without the other. This subject seems to have been argued under an erroneous impression of its being meant, that the right was natural and inherent in the *persons* in whose hands the sovereignty was vested, instead of its belonging to the place or office itself.

Mr. Sedgwick here offers some remarks upon the different principles of the social compact, and the rights of man; but as they have no immediate reference to any part of the Commentaries, it is foreign to the object of these pages to make any comments upon them; and we

* Com. v. 1, p. 46.

† Ibid. p. 49.

shall therefore proceed to the next in order of the learned commentator's propositions, the soundness of which that writer hath doubted. "When civil society is once formed," continues Sir W. Blackstone,* "government at the same time results of course, as necessary to keep that society in order." He had already said,† that "The notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted; and that it is besides plainly contradictory to the revealed accounts of the primitive origin of mankind." But according to Mr. Sedgwick,‡ 'The position that *government results from the formation of civil society* is not intelligible; since' (as he will have it) 'it is the exercise of, and submission to those powers and supreme institutions, in which all regular *government* consists, that gave birth to civil society; or rather indeed is the thing itself.' This position then, in the opinion of Mr. Sedgwick, is unintelligible and incorrect, but we hope to prove the contrary. Now, it clearly is not meant by the learned commentator that government is the natural, immediate, and inevitable result of civil society, that it follows by an unavoidable consequence, as an effect does its cause: but, that to keep such society in order, the necessity of some government results or follows. His idea seems to have been, that civil society was formed, when the various tribes which had separated united and assembled, with a view to one general interest; or when the persons who formed a natural society, agreed to submit to the restraint of civil laws; for immediately above, he defines the original contract of society to be, that the community should guard the rights of each individual; and that each individual should submit to the laws of the community: and says that the contract is understood and implied in the very act of associating together. Consequently, he must have thought that society was formed as soon as that contract existed; and then the meaning of the passage plainly is, that there results the necessity of a government to keep such society in order. That he could not have meant that government, which must carry with it the particular form, resulted as an inevitable consequence, is further evident from his saying in the very passage which immediately follows,

* Com. v. 1, p. 48. † Ibid. p. 47. ‡ Rem. p. 27.

“ unless some superior be constituted whose commands and decisions all the members are bound to obey ;” which shews, that the actual government to which he alluded awaited the deliberation and election of the existing society.

We come now to examine Mr. Sedgwick's hypothesis ; which it is, seems, that ‘—It is the exercise of and submission to those powers and supreme institutions in which all regular government consists, that give birth to civil society, or rather indeed is the thing itself.’ This writer then, has not been able decidedly to settle with himself, whether civil society sprang out of, or subsists in, that exercise and submission. He is only *rather inclined* to the latter opinion : and in a state of mind so undetermined, it was surely somewhat bold to pronounce the learned commentator's position unintelligible and incorrect. But without commenting any further upon the terms in which he has thought proper to state his hypothesis, let us proceed to grapple with his reasoning. That all regular government consists in the powers and supreme institutions alluded to, is accurate enough ; but it is maintained, that it is not the exercise of and submission to, those powers and supreme institutions, which either constitutes, or gave birth to civil society. Were that the case, it would follow, that government preceded society ; for those powers must have existed, before they could have been exercised or submitted to ! Again, if the exercise of and submission to, those powers and supreme institutions in which regular government consists, either gave birth to civil society, or is the thing itself, what, we would ask, gave birth to government ? Who constituted those powers and supreme institutions ? To attain what end were they so constituted ? Is it not obvious that individuals must have been in a state of civil society when they united and agreed to live together under the restraints of civil laws, and deliberated upon the particular mode of government, and the necessary powers and supreme institutions for the regulation of that society ? They became a civil society, from the moment that they united with a view to one general interest, before the precise means for promoting and securing that interest were devised. The great end of government is to preserve civil society in order ; but that society must exist before any means can be exercised for its preservation. Government is the regula-

tion of the thing, not the thing itself. Submission to the mandates of government is not society, but merely an acquiescence in the means devised for the regulation and preservation of society. Mankind, then, were in a state of civil society, when the general mind acceded to the principle that "every individual associated, should pay obedience to the will of the whole; and that the community should guard the rights of each individual;" for government is but the means provided for enforcing the observance of that engagement. It is readily conceded that government is not the immediate and inevitable result of natural society, for there is nothing to that effect advanced in the commentaries.

Remarking upon the necessity of a government, for the preservation of society, Sir Wm. Blackstone observes,* "Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, *as all the members which compose this society were naturally equal*, it may be asked, in whose hands are the reins of government to be entrusted?" In opposing, what is erroneously supposed to be, the principle involved in the above question, Mr. Sedgwick says,† that,—'It is not true, that all men are naturally equal in any sense, which, at the first institution of sovereignty, would render the claim of every one to political power alike valid;' that, 'The great security of the public is in the moral and intellectual fitness of those by whom they (civil jurisdiction and authority) are exercised;' and—that 'No one, therefore could challenge a right to be invested with them on the ground of *natural equality*.' Now, it is allowed, that those observations are perfectly correct in themselves; but considered in relation to the object which they have professedly in view, it is a mere waste of words; for the learned commentator does not mean that all the members are equally fitted by nature, or in any other way, to hold the reins of government; but, that they were naturally independent of each other; and, one individual not authorized to rule over another. That he did not mean by the expression, that each had an

* Com. v. 4, p. 48.

† Rem. p. 33, 34.

equal claim to political power upon the ground of a natural equality, is certain, from his saying, in answer to the very question with which he concludes the above sentence, that—"In general, all mankind will agree that government should be reposed in such persons, in whom the qualities of wisdom, goodness, and power are most likely to be found."

Sir W. Blackstone's observations with respect to these three endowments are, however, not approved of. 'The three grand endowments,' says Mr. Sedgwick, 'which, according to our author, are to be looked for on the first appointment of men to the functions of sovereignty, are Goodness, wisdom, and power: wisdom, to discern the real interest of the community, goodness to endeavour always to pursue that real interest, and strength or power to carry this knowledge and intention into action, these are the natural foundations of sovereignty, these are the requisites which ought to be found in every well constituted frame of government.'* 'But,' continues Mr. Sedgwick,† 'the legislative and executive orders of magistracy are not here discriminated: power (as has been shrewdly remarked,) is that very quality which, in consideration of these other qualities supposed to be already possessed by them, they are at present waiting to receive. It is, moreover, observable, that power, or, in other words, that *public force*, necessary to give efficacy to the legal rights of the subject, and maintain the subordination necessary to social order, must proceed from those who appoint, and cannot inhere in those who are appointed.' It is most unquestionable that *power*, if the *public force* be meant to be expressed by it, must necessarily proceed from those who appoint, and cannot inhere in those who are appointed. But it is conceived that the learned commentator does not mean to attach to the word power any such signification, for he is speaking of the qualities which ought to be found in those in whom government should be reposed. Now, by qualities, he must mean personal qualifications: and in speaking therefore of powers as one of those qualities, he could not mean the public force. Again, the qualities of which the learned commentator speaks, are those which in their per-

fection are among the attributes of the Supreme Being ; the public force, then, cannot be of the number. That he must be understood to speak of personal qualifications is further evident, if further evidence shall be deemed necessary from his using the words *strength* and *power* as convertible terms. Taken in that sense, power is an attribute in which confidence can be safely reposed ; for, as they who possess the personal qualities of wisdom and goodness, are worthy of being entrusted with the legislative ; so they who are endowed with strength and power, in other words, vigour, energy, resolution, and all those other qualifications and properties, which capacitate particular individuals for the command of the public force, merit to be entrusted with the management and direction of the executive. Men may be possessed of wisdom and goodness in a superior degree, and yet be totally unfit for the direction of the public force, by reason of their being deficient in the other above mentioned qualifications : and it would be absurd to suppose, that the direction of the public force, was necessarily well intrusted to a man merely because of his being wise and good. It cannot therefore be justly considered as a very shrewd remark, that power is that very quality which, in consideration of these other qualities (viz. wisdom and goodness) supposed to be already possessed by them, they are at present waiting to receive. If by '*these other qualities*' the other above mentioned personal qualifications, are meant ; then, these are the qualifications which Sir W. Blackstone intends to include under the word power ; and not the civil force bestowed in consequence of those qualifications. Although the public force proceeds from those who appoint, yet much depends upon the personal powers of him who is to wield that force, the powers to which the learned commentator alludes, and which are or ought to be found in those who are appointed. As therefore by power, Sir W. Blackstone means certain personal qualifications, and not the public force ; the observations of Mr. Sedgwick are without any weight.

Sir W. Blackstone, when commenting upon the democratical, aristocratical, and monarchical systems, observes,*—"In a democracy, where the right of making laws resides in the people at large, public virtue or goodness of intention is more likely to be found, than either

* Com. v. 1, p. 49, 50.

" of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution ; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit : in aristocracies there is more wisdom to be found than in the other frames of government, being composed, or intended to be composed, of *the most experienced citizens* ; but there is less honesty than in a republic, and less strength than in a monarchy." These positions are thus combatted by Mr. Sedgwick : *—
 " But what ground of persuasion have we, that where there is little intelligence there is more integrity ; or that where there is more wisdom there will be less virtue ? There is nothing in ignorance that should awaken the spirit of justice, or in knowledge that should repress it. There seems to be no natural connexion between dullness and democracy, nor between reason and rank : somewhat of relation, however, may, and certainly does, exist between wisdom and rectitude." Now the first and last positions, viz. that in democracies there is a greater probability of finding public virtue or goodness of intention, than either wisdom or strength ; and, that there is less strength in aristocracies, than in monarchies, do not appear to be disputed. The objections raised are only against the doctrines, that there is more wisdom to be found in aristocracies than in the other frames of government ; and, that there is less honesty or goodness of intention in aristocracies than in republics. Let it be remembered, that we are not here speaking of aristocracies as forming a part of any particular system, but as an integral government. We may concede, that all the gentleman's observations upon the subject are correct, and then inquire to what purpose they have been advanced ? for the learned commentator has not asserted, nor does it follow from his doctrine, that integrity goes hand in hand with dullness rather than with wisdom, or, that there is any natural connexion between reason and rank : nay, he has not advanced any observation from whence it can be inferred, that in his opinion integrity does not rather accompany wisdom than ignorance. It may be admitted without prejudice to Sir W. Blackstone's doctrine, that he whose understanding is invigorated by the principles of moral truth and liberal science, is likely to have

* Rem. p. 6.

more of magnanimity in his conduct, and of uprightness in his views, than another of mean capacity and narrow attainments; for it would not hence follow, that there is as much honesty likely to be found in an aristocracy as in a republic. On the contrary, we shall contend, that there is more public virtue or goodness of intention likely to be found in a democracy, as soon as it hath been considered whether there is more wisdom in an aristocracy, than in either of the other frames of government. It seems to be a position, the truth of which would have been thought self-evident, had it not been disputed in the 'Remarks,' that an aristocracy—a government entirely composed of the wisest and most experienced citizens in the state, must, as a government, necessarily possess more wisdom in its deliberations, than a democracy;—a government in which every individual—as well the ignorant and illiterate, which form a vast majority every where, as the enlightened citizen,—has an equal vote and share in matters of legislation. The admonitions of wisdom, and the suggestions of sound reason, are, in a democracy, borne down by the clamour of the multitude; who, blinded by their ignorance, and hurried madly on by their passions, are unable duly to appreciate the value of the measures, which the more enlightened individuals of their body may propose, and, are led to adopt others more plausible perhaps and better suited to the temper of their minds: but, in reality, ill-contrived and ineffectual.—It is really unaccountable, that Mr. Sedgwick should suppose the learned commentator to entertain an opinion, that aristocracies possessed a greater degree of wisdom, than the other systems, upon the ground of their being any *natural connexion* between reason and rank; when, he absolutely assumes an aristocracy to be "composed or intended to be composed of the *most experienced* citizens." With respect to there being more wisdom in an aristocracy than in a monarchy—there obviously must be more wisdom in a government composed of many wise men than in one consisting of only a single individual, however enlightened.

Then as to goodness of intention.—In a democracy, every individual who gives his vote in favour of any particular law which is to bind others, knows, that the same law cannot but affect himself in the same manner as every other person. He can have no inducement, to propose

what is unjust towards others, because, if adopted, so far from being benefited would he be, that in the same degree with every other individual would he himself be aggrieved by that injustice. It is therefore true that popular assemblies have always a degree of public spirit. That they aim to promote the public good. It is their obvious interest, looking to no higher motives, that they should do so; in order to insure their proportion of that good as making one of the public. But is there the same probability that public spirit or goodness of intention would pervade the acts of an aristocratic body? They would too, it is admitted, be affected by the public acts; but then there might be danger, that such temptations would offer themselves, as would infinitely counterbalance the inconveniences resulting to themselves in common with others; and thus be seduced from their duty to pass unjust laws. There might be danger that to enrich themselves, they would burthen the country or sell its best interests to foreign powers. There is not therefore, the same certainty of finding public spirit or goodness of intention in aristocracies as in democracies; although there would be more wisdom. At the same time, however, it is admitted, that there would be a greater probability of finding public virtue or goodness of intention in a government composed of a few of the wisest, rather than in one made up of the same number of the comparatively ignorant part of the community.

We are told,* that 'The documents of history will not bear Sir W. Blackstone out in the assertion that patriotism or public spirit *always* more or less pervades the views and measures of popular assemblies.' But these documents do not go any way towards proving, that in any one measure there was not some degree of public spirit. They are merely instances of that jealousy and suspicion which are always to be seen in republics; and to which undoubtedly some of the most zealous patriots and best citizens have fallen victims. The 'Remarks,' upon this subject serve to evince some of the numerous disadvantages attending the democratic form of government; but as to whether public spirit or goodness of intention be an ingredient or not, they have not the smallest application.

* Rem. p. 36.

It is said also,* that if 'the above reasoning of Sir W. Blackstone be well founded, 'it were most to be desired 'that the functions of legislation should be exercised by 'the people at large.' And why? Because forsooth 'nature is not greatly partial in the bestowal of her gifts; 'and some superior minds, it may be expected, would always spring forward to direct the incorrupt zeal and generous aim of the less enlightened?' But would the multitude be always prone to follow whither those superior minds would conduct them? Would there not, it is asked, be any danger of their being imposed upon by some designing knave? Do not the 'documents of the history,' of times not very ancient, furnish us with examples? The gentleman himself says,* that 'the stale pretence of a zeal for the rights of the people is a sure bait for the vulgar; and that it is a veil which serves to conceal 'from those that are led, the guileful and treacherous designs of their leaders.'

'At the worst,' it is added,* 'this general purity of intention would reach its object sooner, and secure it better 'than that wisdom which in aristocracies is said to be ill 'supported by probity.' The assertion of Sir. W. Blackstone, however, is not that an aristocracy is *ill supported* by probity; but only that there is *less* honesty in an aristocracy, than in a republic; he gives no opinion whether an aristocracy or a democracy is to be preferred; but merely observes, that each has its perfections and imperfections; that democracies are usually the best calculated to direct the end of a law, and aristocracies to invent the means by which that end shall be obtained. The learned commentator's investigation, as to the peculiarities of each form is made with the view of afterwards shewing that the British constitution combines the advantage of each system; the whole of his reasoning being intended to prove, that in no other shape could we be so certain of finding the three great requisites of government so well and so happily united.

After a few further remarks on democracies, and on a few positions in the spirit of laws, (both of which will be passed over without a comment as they are not connected with any observations in the Commentaries), Mr. Sedg-

* Rem. p. 35, 36.
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† Ibid, p. 38.
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‡ Ibid. p. 36.

wick, in the next place, observes,* that ‘so infallible and exclusive, in the opinion of the learned commentator, is the predominance of the three principles respectively ascribed to their congenial form of polity, that not only does the British constitution provide for and secure their presidency, but, “If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either *absolute monarchy*, aristocracy, or democracy; and so want *two* of the three ingredients of good polity, either virtue, wisdom, or power.”† Upon this position the author of the ‘Remarks’ offers‡ the following criticism—‘The last of these three ingredients, it is evident, could not in either event be defective. However we might deplore the lack of wisdom and virtue, it is not easy to imagine it possible that *power* could be wanting in either member of the state in which the supreme *power* should be exclusively lodged.’ Now by the supreme power, the learned commentator meant, the sovereignty, legislature, or power of making laws. “By the sovereign power,” says he, “is meant the making of laws,”§ And there surely is not any incorrectness in saying, that if the legislature or sovereignty were vested in the aristocratic and democratic branches of our constitution, it would, as a constitution, be deficient in power, and exposed to the inconveniences of aristocracy and democracy. That such was the meaning of the learned commentator appears from his saying,|| in enlarging upon, and for the purpose of illustrating the same subject—“If the *supreme rights of legislature* were lodged “in the two houses only,” &c. It is perfectly clear that where the supreme power is exclusively lodged there must be power of some kind or other. Mr. Sedgwick seems to have thought that he had hemmed in the learned commentator on all sides by stating in effect that self-evident proposition. But who does not see, that the supreme power or power of making laws, may be vested in a particular species of government, as a democracy, for instance, and yet that government want power, in other words, that energy, strength, and prompt execution, which is the

* Rem. p. 44, 45. † Bl. Com. v. 1, p. 51. ‡ Rem. p. 45.
§ Com. v. 1, p. 49. || Ibid. p. 51.

distinguishing characteristic of a monarchy. But in truth the learned commentator is not to be understood to mean, that where the executive power or direction of the public force is lodged, power would be *absolutely* wanting; nor that power resides exclusively in monarchies; but, merely, that it is not to be found in the other forms of government in *equal degree*. That he is speaking *comparatively* upon this subject appears from his remarks in the preceding page, as to there being *less* strength and *more* wisdom in aristocracies than in monarchies? So Montesquieu, who ascribes an ascendant quality in every form of government does not deny that other qualities may not be found in that form; nor, that the predominant quality of any particular form, is not to be found in a *less degree* in other forms.

The next position in the Commentaries, the accuracy of which is questioned, is, that—"The constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest."* Before we attend to the remarks of Mr. Sedgwick, it may not be amiss to observe that by the expression, 'equilibrium of power,' the learned commentator meant, that equal power of putting a negative upon the proposed measures of the other two, which each branch possesses. "That each branch is armed with a negative power sufficient to repel any innovation which it shall think inexpedient or dangerous."† The author of the remarks, however, doubts 'whether any such counterpoise of power as that which Sir W. Blackstone speaks of ever existed.' With respect to the negative with which each branch is provided he admits that 'It is in this reciprocal right of rejection and controul that that balance which is supposed to constitute the perfection of our government is held to reside. But this idea of a *balance*,' he observes,§ 'so familiar to our minds, will be found, on reflection, to misrepresent and bewilder the subject it is intended to illustrate. That it does not consist in an *equilibrium of power*,' he continues, 'is palpable; for were an exactly equal portion possessed by each of the three branches, the attempt of either to resist at any time the concurrent will of the other two, would be utterly fruitless; if again, the combined ef-

* Com. v. 1, p. 51.

† Ibid.

§ Rem. p. 18.

'forts of *either two*, could be defeated by *the third*, the division of power could not be proportionate, for such preponderance would in that case become impossible.' Now, in reply to Mr. Sedgwick, it is admitted, that if three persons or things be possessed of an equal portion of physical or mechanical power, it would be utterly fruitless for either to attempt to resist the united force of the other two; but the power in question is merely an authority in each of the three branches to prevent the completion of any measure which either of the others may propose, by withholding the necessary assent. Were it otherwise, the alternative expressed by that gentleman would be inevitable; for if one of the three branches were in that case capable of resisting the other two, then could not each have an equal portion of power; or if proportionate, then would such resistance be fruitless. But the theory of the British constitution as well as the arguments of the learned commentator, upon an accurate and minute examination, will not be found to be assailable upon the score of any such absurdity; for neither of the three branches has, nor have any two of them conjunctively, the power of bringing any legislative measure to a final conclusion without the previous consent of every one. They can merely submit, not decide—propose, not carry into effect—without the concurrence of the whole. As therefore neither branch has, nor have any two of them conjunctively, a power of acting efficiently without the approbation of the whole, there is not any application in the observations of Mr. Sedgwick as to the quantum of power possessed by two of them over the third.

The objections which have been made to the expression, 'equilibrium of power,' are unsubstantial; for its obvious signification is, that this power of negating the proposed measures of the other branches should be possessed by each in equal measure and degree with, and exercised without being in any shape influenced by or dependent upon the will of, the other branches. That is manifest from the passage in the Commentaries which immediately follows the one under consideration—"For if ever it should happen that the independence of any one of the three should be lost," &c. By the equilibrium of power then, it is meant that the three branches should be equally independent of each other; in other words, not to be influenced by, or subservient to, either of the other branches, which would cause a preponderance in

the one possessing that influence, and so destroy the equilibrium.

But the author of the 'Remarks' observes further,* that, 'With respect to the negative with which each branch is provided, the power of that branch upon whose resolution it is exercised, is, in each particular instance, essentially destroyed; it is not balanced, but annihilated;' and that 'Power is in its nature active; if by any opposite force of equal energy, it is kept quiescent, its essence is gone.' But how can the power be said to be in any shape destroyed, when that power merely extended to the right of proposing? When the proposal was made (and every measure which requires the assent of others is when submitted for their approbation nothing but a proposal) the power of that branch was exercised to its full extent. When any other branch withheld its consent, the proposal was only not acceded to. The power of making it was not, could not, be destroyed, balanced, nor even in any degree affected. This right of proposing is not, however, what is alluded to by Sir W. Blackstone, but only the power to reject. The power of proposing any law, on the one hand, and of setting a negative upon such proposal, on the other, may therefore be substantially enjoyed; nor does the putting the former in act, cause the latter to be at an end; for it never extended any further than to propose. With respect to the remark† that 'Should either become corrupt, all effective government would be destroyed;—it is true enough; for the learned commentator himself says, that "If ever it should happen that the independence of any one of the three should be lost, there would be an end of our constitution."

It is, in the next place, contended in the 'Remarks,' that in strictness it is not true, as Sir W. Blackstone asserts,‡ "that the legislature is entrusted to three distinct powers entirely independent of each other;" for, says Mr. Sedgwick,§ 'The constitution has consigned to each order certain exclusive prerogatives, of a distinct and appropriate kind, which render them, and which were intended to render them, to a certain degree dependent on each other.' That each of the three orders has

* Rem. p. 48. † Ibid. p. 49. ‡ Com. v. 1, p. 50. § Rem. p. 49.

certain exclusive prerogatives is true. No one disputes it. Certainly the learned commentator did not; for in another place he defines those prerogatives; but, that either power possesses by the constitution, prerogatives which as a part of the legislature, and in the act of legislation, render either of the other branches in any imaginable degree dependent upon it, every Englishman who knows that constitution, its spirit and letter, will sternly deny. Mr. Sedgwick, however, asserts, that 'It was the aim of the framers of our constitution, not that each order should be entirely independent, but that neither should be directly subordinate.' They are to be subordinate then, it seems, only not *directly* subordinate. They may be influenced, but it must be mediately. Such, however, is not the constitution of England; for each of the three branches, as forming a part of the legislature, is in the most absolute sense independent; else wherefore, or to what end, the power which each separate branch possesses of preventing the completion of the proposed measures of the other two?

Speaking of the danger to the constitution which would follow from the destruction of the equilibrium of power between one branch of the legislature and the rest, Sir W. Blackstone* observes, that "If ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. That the legislature would be changed from that, which (upon the supposition of an original contract either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society: and that such a change, however effected, is, according to Mr. Locke,† (who perhaps carries his theory too far) at once an entire dissolution of the bands of government, and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power." After pronouncing this language to be extremely indeliberate, Mr. Sedgwick asks, 'Is there then no remedy to be found within the pale of the constitution, for any temporary aberration from its true princi-

* Com. p. 51 and 52.

† On Gov. Part. II. § 212.

'ples? Should the edifice at any time decline from its perpendicular, is it to be considered as fallen from its base? &c. &c.* But positions which have received the sanction and support of such minds as a Blackstone and a Locke possessed, are not to be disproved by the declamation into which the gentleman appears to have been hurried. They contend that inasmuch as the constitution consists in having the legislature composed of three branches, which, *quoad* the power of making laws, are entirely independent of each other, that constitution is gone, and the bands of government dissolved as soon as either loses its independence; or becomes subservient to the views of either of the other two. Now in what manner does Mr. Sedgwick attempt to dispute the truth of this? By offering any thing resembling arguments to shew that the constitution may survive the loss of that independence? No; but by *assuming*, in the first place, that such a subserviency is only a *temporary aberration* from the true principles of the constitution; that it is only *'an occasional deviation from the true line and level,'* that *'the edifice is only declined from its perpendicular,'* and in the next place, by enlarging upon, and giving the rein to, his imagination, in describing the calamities which might follow a dissolution of the bands of government.† Why, if the entire independence of each of the three orders constitutes a vital part of the constitution, the subserviency of any one of them is something more than a temporary deviation from its principles. It is a destruction of those principles. A death blow to the constitution. If either of the three powers should happen to become subservient, it could not afterwards have independent action. The edifice would not merely have declined from its perpendicular, but would have become rotten to its very foundation; and could no longer be inhabited with any reasonable security.

To be without government, says the author of the 'Remarks,'‡ is to be reduced to the most calamitous condition which our nature admits; and yet, in a note in the very next page, adduces the condition of the province of Massachusetts, in the American war, as an instance of a state, in which although the whole system of its government was done away, yet *discipline and decorum* were every

* Rem. p. 51.

† Ibid. p. 51, et seq.

‡ Ibid.

where observed. The evils which are to be apprehended from a dissolution of government are, however, incalculable ; and may the danger be ever present to the minds of all, and awaken in every individual a spirit of never ceasing watchfulness for the preservation of our constitution pure and entire, against *every* description of innovation.

With respect to the expression—"Subservient to the views" as used in the above extracted paragraph from the Commentaries, Mr. Sedgwick makes the following remarks* 'This expression is much too vague ; by the very nature of their organization they must (and it seems essential that they should) be subservient to the views of each other: It is only when either has become so degenerate as to become wilfully instrumental to the *iniquitous and unconstitutional views* of either of the other two, that the subversion of freedom is to be apprehended.' Now the distinction here taken is certainly of a very rare, if it cannot be said to be of a very subtle, kind. Let us examine, first, what is the meaning of the word subservient; and secondly, if the expression in which it occurs has not a definite instead of a vague import. The derivation of the word, and the sense in which it hath been used by our best writers and lexicographers, combine to shew, that it signifies the being subordinate and ministerial ; in other words, acting at command and under superior authority. But if the signification of the word had been less precise when abstractedly considered, yet the meaning which it bears in the above paragraph would be clear and definite ; for the learned commentator having previously informed us, that the legislature of the kingdom was entrusted to three distinct powers entirely independent of each other—afterwards says,† that "the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it but destroying the equilibrium of power between one branch of the legislature and the rest." And then follows the sentence in which the expression which hath been objected to, occurs—"For if ever it should happen," the learned Commentator adds, "that the independence of any one of the three should be lost," or that it should become *subservient to the views* of either of the other two, there would soon be an end of the

* Rem. p. 50 (in a note)

† Com. v. 1, p. 51.

"tution." It is impossible therefore, that any other meaning should be imputed to the expression "subservient to the views," than that of being compellable to act according to the will and command of the power to which it should be so subservient. It is palpably erroneous to say, that 'by the very nature of their organization, they must (and it seems essential that they should) be subservient to the views of each other.' It is in direct contradiction to the true principles of the constitution; for by the constitution, so far from the truth is the assertion with respect to either branch being subservient to the views of the other—that each is "armed with a negative upon the proposed measures of the others, sufficient to repel any innovation which shall be inexpedient or dangerous." Indeed Mr. Sedgwick admits in page 48 that each is possessed with such a negative; although it is afterwards said in page 50 that they must and should be *subservient* to the views of each other. Try this new doctrine by the absurdity of its consequences only, and with that view let us suppose, that the commons propose one measure; the lords, another, of an opposite nature; and the crown, a third, irreconcilable with the other two; if they are to be subservient to the views of each other, the lords and the crown must accede to the measure proposed by the commons; and the commons and crown to the measure proposed by the lords; whilst the lords and the commons again, must adopt the measure proposed by the crown. So that measures would often be taken absolutely repugnant to each other, and each directly counter to the wishes of two out of the three branches, whose ratification they receive and whose deliberate acts they purport to be. The distinction which the gentleman endeavours to make is that—it is only 'when either has become so degenerate as to become wholly instrumental to the *iniquitous and unconstitutional* views of either of the other two, that the subversion of freedom is to be apprehended.' But it is evident, that if one of the three branches should happen to become subservient to the views of either of the others, or in other words, should be obliged to act in conformity with its wishes and commands, that the branch so subservient must become instrumental to those views whatever they may be—whether iniquitous and unconstitutional or otherwise. Whether in being thus instrumental, it would

be wilfully or passively, by choice or by any kind of compulsion—the subversion of freedom would be equally to be apprehended. The degeneracy of the subservient branch would arise from its subserviency, without any reference to the particular views which it might be instrumental in promoting by reason of that subserviency. It is most true, that they ought to second and support the just and constitutional views of each other; but then, not upon any ground of subserviency. If one be subservient to the views of another, the former must at all events conform to the views of the latter, whether they may happen to be just or unjust, constitutional or unconstitutional.

It is now necessary to revert to the doctrine of Locke, as cited by Sir W. Blackstone, that if such a subserviency should take place, it would be a dissolution of the bands of government; and the people thereby be reduced to a state of *anarchy*. And here again there is further matter for complaint, that the gentleman has not understood the meaning of the proposition which he endeavours to controvert; for he with much earnestness observes—
 ‘Never under any emergency can man be exempt from those complexities which bind him to his fellows; that in no condition of his existence can he stand disengaged from the obligations of moral law; and that it is the law of his being, and its validity is constant and eternal. And again, in the next page, supposing that it should become expedient ‘to disband the political force, and depose the existing authorities of the society,’ that gentleman contends that ‘the individuals composing it would be reduced, not to a state of *anarchy*, but to a state of moral equality.’ As if either Locke or Blackstone had asserted that in the event of a dissolution of government men would be released from the obligations of moral law! They say, that in such an event, the people would be reduced to a state of *anarchy*, and in so doing, speak with the utmost correctness: for what is a state of *anarchy* but simply a state wanting government? One would have supposed, that when the government was done away, the people would be in a state of *anarchy*; and we must confess our total inability to guess what signification the word *anarchy* bears in this gentleman’s vocabulary, if want of government or of magistracy, be not its legitimate import. That it can mean nothing more than a state wanting go-

vernment as used by Locke and Blackstone is plain; for they say in effect, that by the dissolution of the bands of government, the people were reduced to a state of anarchy. And what is the consequence? Is it asserted that they are released from the obligations of moral law in that state? No: but that they have liberty to constitute to themselves a new legislative power. The inhabitants of the province of Massachusetts, during the period above mentioned, were, at one and the same time, in a state of anarchy and in a state of moral equality.

But Mr. Sedgwick professes to make us acquainted* with what it would be our duty and interest to do, should it happen that the independence of any one of the constitutional powers (should for a time)† be lost. 'It will be our chief duty and our chief interests' (he says) 'to inquire by what means we may remedy its obliquities, without risking the loss of its vital good; how we may best amend its disproportions without endangering its stability.' But this is not to the purpose. The necessary information, is, what otherwise than building it anew could be done with an edifice shaken to its very centre—with every bond and cement in a state of dissolution—even its very foundation destroyed—for that is the condition which Mr. Locke supposes in the place referred to by the learned commentator. They are speaking of the consequence, which would follow the *absolute loss* of the independence of one of the three powers; and that being the case, these observations respecting *temporary aberrations, occasional deviations, obliquities, disproportions*, independence lost for a time, and others of the same description, give rise to a suspicion that the writer's aim is to slide by the true question to be considered, instead of joining issue fairly upon its merits. But whether the edifice be only oblique or rased to the ground, what, after all, are the means that Mr. Sedgwick suggests for restoring the purity and vigour of the constitution, and which are to supersede the necessity of a re-organization? After condemning the suggestions of Locke as injudicious, and not fit to be adopted, it was to have been expected that we should have been furnished with some others in their stead. But the gentleman contents himself with saying, that 'it

* Rem. p. 54.

† Ibid. p. 53.

'will be our chief duty and our chief interest'—To do what? Why, truly, to *inquire* or *seek out* those means. He tells us indeed* that—'Without elevating our minds into the tracks of metaphysical sublimity, we must attend to the frame and constitution of man; his manners, his wants, his prejudices, his infirmities, and even his vices.' That 'taking these (our physical and moral depravities) into calculation, we see distinctly our object, and in our expedients and precautions we provide against them.' Still we are without the only needful information, which is, in what do those expedients and precautions consist? In this state of the argument, it may not perhaps be amiss to ask, what possible means could be pursued in the event of the independence of one of the three powers being lost, except an entire re-organization of the legislative powers? Suppose, for example, and merely for the sake of argument the commons house of parliament to lose its independence, and to become subservient to the views of the crown—what means could the people pursue to restore the independence of their commons? They would petition parliament: the virtuous part of their representatives would exert themselves to the utmost: but obviously, all this would be to no purpose, if *as a body* they were subservient to the views of the crown. In fine, it seems, that there would be no alternative but to avail themselves of the liberty which, according to Locke, they would in such a case possess, to constitute to themselves a new legislative power.

We come now to defend some positions in the Commentaries, from which Mr. Sedgwick, as well as Mr. Christian before him, have attempted to deduce conclusions the most unwarrantable—conclusions which not only do not follow from, but are absolutely excluded by, those very positions. The learned commentator observes, that "In relation to those laws which enjoin only *positive duties* and forbid only such things as are not *malu in se* but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty to noncompliance, here, I apprehend, conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws. That in those cases the alter-

* Rem, p. 54.

“ native is offered to every man : *either abstain from this or submit to such a penalty*; and his conscience will be clear “ whichever side of the alternative he thinks proper to “ embrace. That those prohibitory laws do not make the “ transgression a moral offence, or sin, and that the only “ obligation in conscience is to submit to the penalty if “ levied. It must, however, be observed,” adds the learned commentator, “ that we are here speaking of laws that “ are simply and purely penal, where the thing forbidden “ or enjoined is *wholly a matter of indifference*, and where “ the penalty inflicted is an adequate compensation for “ the civil inconvenience supposed to arise from the offence. But where disobedience to the law involves in “ it also *ANY DEGREE of public mischief or private injury*, “ there it falls within our former distinction, and is also “ an offence against conscience.”* Now having laid before the reader the general doctrine which is advanced in the former part of the above paragraph ; and also the qualifying observation with which that doctrine is accompanied ; it may be proper to stop one moment here to inquire if it does not follow from the whole, that with respect to any law, the breach of which involves any degree of public mischief or private injury, we have no alternative but to observe the law, and cannot be guilty of a breach of it, without offending against conscience, even although we may be ready to pay the penalty ? Is not the distinction plainly this, that where the law relates to matters of indifference, and for the breach of which the penalty is an adequate compensation, we have an option either to observe the law, or submit to the penalty ; but where any public mischief or private injury would ensue a breach of the law, we have not any such choice, but ought at all events to conform to the law ? The reader, who has perused the above passages in the Commentaries, with sufficient attention to comprehend their meaning, will perhaps be surprised to hear of its having been asserted, that, according to the doctrine therein contained, smuggling, which is indisputably attended with much public mischief, is justifiable, provided the penalty, when levied, be submitted to ! Strange, however, as it may appear, both Mr. Christian and Mr. Sedgwick have con-

* See El. Com. v. 1, p. 57, 58.

tended that the learned commentator's observations are an authority for the doctrine that the payment of the penalty is a sufficient atonement for the offence of smuggling. The same remarks will serve as an answer to both.

Mr. Sedgwick then, after taking notice of the duties imposed upon certain foreign articles of home consumption, and the penalty for nonpayment of such duties, asserts* that—'according to the doctrine we are considering, the offence of evading such duties is fully expiated by the payment of the penalty, if levied.' That—'What will justify one man in this case will justify another. And that—' All smugglers then, however numerous, are 'free to render unproductive the most prolific sources of 'national revenue, &c. without their conscience being any 'farther concerned than to submit, on demand, to the 'payment of a fine they can no longer evade.' It is unnecessary almost to insist upon it, that no such consequence would follow from the learned Commentator's doctrine; in other words, that that doctrine does not sanction smuggling; for, as *public mischief* would follow the unproductiveness of the sources of national revenue, all such offences as smuggling, are, according to him, offences against conscience, and therefore not to be committed, even if the penalty should be paid.

This attack upon Sir William Blackstone, weak as it is, is, however, followed up; for the learned commentator, in another place,† when speaking of the great temptations to smuggling, and the necessity of preventing it, having observed, that "recourse must be had to extraordinary punishments to prevent it, perhaps even to capital ones, "which destroys all proportion of punishment, and puts "murderers upon an equal footing with such as are really "guilty of no natural, but merely a positive offence," Mr. Sedgwick remarks‡ upon it, that 'It were hardly 'justifiable, one should think, to make *death* the event of a 'choice avowedly given, and which might *conscientiously* be 'accepted.' Now, so far from avowing that any such choice is given in such cases as smuggling, or, that it might be conscientiously accepted, was the learned commentator, that, on the contrary, he in effect pronounces all such offences as smuggling to be offences against con-

* Rem. p. 58. † Com. v. 1, p. 317. ‡ Rem. p. 59.

science, and unjustifiable. It is a mode of argument which reflects no credit upon those who have resort to it, when they see positions laid down with certain qualifications, thus to dispute the truth of those positions, as if they had not been qualified at all.

After having attacked the positions of the learned commentator with respect to the choice of observing the law or paying the penalty, as if they had been unqualified, Mr Sedgwick is afterwards constrained to take notice of those observations which limit the doctrine "to laws that are simply and purely penal where the thing forbidden or enjoined is wholly matter of indifference." With respect to this qualification, he observes,* that—"Those who imbibe the general principle may not always discriminate with precision the cases to which it is to be restricted; that it does not seem easy to discover the necessity of infictive laws to control the subject in matters of no moment; that natural justice cannot warrant nor sound policy require them; that to annex a penalty moreover to the non-observance of such laws is a flagrant and manifest oppression." But what have such remarks as these to do with the argument? The truth of the learned commentator's doctrine would not be in the least shaken, even if it were to be admitted, that those who imbibe the general principle do not always discriminate with precision the cases to which it is to be restricted,—that it is not easy to discover the necessity of such laws—that they are not called for by natural justice and sound policy—and that to annex a penalty to their non-observance is oppressive. We would most willingly concede the whole of them to the writer, if, in return, he would be only so obliging as to inform us, how they are applicable, when the question is, whether there are such laws in existence, and not whether those laws are just or oppressive? In truth, if, as candour ought to have directed, that gentleman had taken the whole of Sir W. Blackstone's observation together, and had considered his doctrine in a qualified sense, (and no two persons who have read the Commentaries, can otherwise understand them;) there would not have been room for any other remarks than those last taken notice of; and we should have been saved the trou-

* Rem. p. 59, 60,

ble of making an exposition of those arguments, which could only be brought to bear, in case that doctrine had been laid down as general and unlimited.

But it is said that,*—‘To admit the existence of compulsory edicts, guarded too by penal sanctions, which are neither preventive of evil nor productive of good, but so absolutely neutral and irrespective that the thing commanded or enjoined is wholly matter of indifference, is to *libel the legislature* and *calumniate the constitution*.’ Now the learned commentator has certainly admitted the existence of such laws; and hath said,† that laws which regulate and restrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty. But it would be offering an indignity to his memory, if any observations in this place could for a moment be thought necessary to defend it against such a charge as that of having been a libeller of the legislature and a calumniator of the constitution. Indeed it is presumed that there will be found but few (if any) readers, unwilling to believe, that Mr. Sedgwick himself must have overlooked the necessary inference from his own observation, or he would not have permitted it to remain; and the more especially, as the most favourable opinion possible is called for with respect to that observation, not merely to exclude the supposition of its having been intended to throw out an unworthy suspicion, as to any want of respect and regard in the learned commentator towards our admirable constitution, but as matter of lenity towards this controvertist himself, in as much as he must otherwise stand self-accused and self-convicted of this most serious imputation; for learn, O gentle reader that afterwards (mirabile dictu!) he actually asserts‡ of one of those very penal statutes which Sir W. Blackstone hath adduced—the statute which inflicts a penalty for exercising certain trades without having served an apprenticeship—that it is ‘a *wrongful violation* of the first principles of freedom and relative justice!’ Here then the existence of a compulsory edict of the identical description in question is avowed by the very same writer, who says, that to admit the existence of such edicts is to libel the legislature and calumniate the constitution!

* Rem. p. 63. † Com. v. 1, p. 126. ‡ Rem. p. 279.

We must not, however, be content with thus turning the gentleman round, for he may be made distinctly to refute his own arguments, and to support those which he has presumed to controvert. It must be remembered, that the position which the author of the 'Remarks' combats, is, that "where public mischief or private injury would not attend a breach of the law, we may either observe the law or submit to the penalty." Now, upon the statute of apprenticeship in addition to what hath been already quoted, he says,* that—"No individual should, in justice, nor can, consistently with the general benefit, be prohibited from exercising, for his own honest profit and support, whatever of his ability or skill may be subservient to that end. But that the statute of apprenticeship is directly *preventive* of that."—This statute then, in the gentleman's opinion, is a prohibitory statute, which prevents individuals from exercising their skill for their honest support; a statute, which in its operation, he considers unjust as it regards individuals, and inconsistent with the general benefit; nay, 'wrongfully violating the first principles of freedom and relative justice.'† A statute therefore, which, in his estimation, has at least no reference to the general welfare, if it be not manifestly subversive of the felicity and freedom of the people. Now listen to what he says,‡ when controverting the above point in the Commentaries with respect to prohibitory regulations:—"Were they," he observes, 'enacted *without reference to the general welfare*, or were they manifestly subversive of the felicity and freedom of the people, under such circumstances, indeed' (the very circumstances whose existence he himself maintains) 'no principle of justice, no rule of reason, could direct an implicit submission to their authority: for since those are the great objects to be attained by all such regulations, no one can be obliged *in foro conscientia*, to become instrumental in defeating them.' Why, what is this but saying that in justice, reason, and conscience, we shall stand excused if we should be guilty of a breach of this statute? Is it not equivalent to the doctrine of the learned commentator, that we are not compelled to show an implicit submission to the directions of such laws, and that consci-

* Rem. p. 277. † Ibid. p. 56. ‡ Sup. p. 48.
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ence is not farther concerned than by directing a submission to the penalty in case of our breach of them?

But without examining whether our code does not contain some laws, which, looking to their original policy, may be considered as trenching unnecessarily upon the liberties of the subject, we would ask the author of the ‘Remarks’ if it never hath occurred to him that some laws still unrepealed, having penalties attached to them, and which originated in sound policy, are now become mere matters of indifference as to their being observed or not? Without pressing the statute of apprenticeship any further upon his attention at the present moment, it will perhaps be sufficient, by way of example, to make a remark or two upon another of the laws mentioned by Sir W. Blackstone—the law which requires the dead to be buried in woollen. Now, when that act was passed the staple trade of the kingdom stood in need of every encouragement; but in the present state of manufactures and commerce it cannot require any such adventitious aid; and there was consequently no such inconsistency as hath been attempted to be shown* in the learned commentator’s speaking† of this law, when looking to its original policy, as a law consistent with public liberty, because promotive of the staple trade; and in another place,‡ when looking to the necessity of its being observed at the present day,—as a law the observance or non-observance of which is a matter of indifference. “When the reason ceases,” says the learned commentator,§ “the law itself *ought* likewise to “cease with it.” But it does happen, in some cases, that the law survives its original policy; and where that is the case, there cannot be any obligation in conscience to observe it—any want of integrity should it be infringed. As at this day neither public mischief nor private injury would result from a breach of such laws, the only obligation in conscience with respect to them is according to the learned commentator’s doctrine|| “to submit to the “penalty, *if levied*.” This expression, *if levied*, hath been caught at.¶ ‘He may well wait, it seems,’ says Mr. Sedgwick, ‘until the infraction is discovered, and the amercement claimed;’ and further observes that—‘The extent

* Rem. p. 59 (in a note). † Com. v. 1, p. 126. ‡ Ibid. p. 58. § Ibid. p. 61. || Ibid. p. 58. ¶ Rem. p. 55, 56.

of Sir W. Blackstone's reasoning cannot be circumscribed. That if such ordinances of the civil power as have no absolute connexion with the primary law of morals may be eluded without guilt, provided the transgressor, if detected, is prepared to tender the forfeiture incurred, every man, whose conduct is removed from immediate inspection, may with little danger, and without responsibility, violate the restrictive municipal statutes of his country, and lay aside that understood faith which the members of every community are held to preserve towards each other.' It obviously, however, does not follow from the learned commentator's reasoning that the restrictive municipal statutes of the country generally, as the above observation of Mr. Sedgwick would imply, may be violated without guilt, nor that understood faith of which he speaks, be laid aside, provided the transgressor, if detected, is prepared to pay that forfeiture—and for this reason, that public mischief, would in many cases be involved in such disobedience: for the doctrine of Sir W. Blackstone is, that every ordinance of the civil power, the breach of which would involve in it any degree of public mischief or private injury must at all events be obeyed, and cannot be infringed without an offence against conscience. The words, "if levied," as used by the learned commentator, were necessary to meet such ordinances as the above mentioned statute relating to apprenticeships; and, to which, according to the gentleman himself, we are not, by any principle of justice, by any rule of reason, directed—or in *foro conscientia* bound—to pay an implicit submission—cases, where it may be supposed that in many instances the penalty never would be levied nor the payment of it enforced.

The author of the 'Remarks' asserts also,* that we may assure ourselves that no such choice either is, or is intended to be given as—"either abstain from this, or submit to such a penalty"† that—"a legislature would ill discharge the trust reposed in it, that should propound any such option." But this is not the point; for the question is not whether the legislature which made the law intended to offer the subject the alternative, and to leave him at liberty to choose between the two; but whether he must

* Rem. p. 61.

† Bl. Com. v. 1, p. 58.

at all events conform to the law; or, rather, may not with a safe conscience violate the law upon payment of the penalty affixed? Now the learned commentator is only speaking of such laws, as, for example, that above mentioned, which inflicts a pecuniary penalty for exercising certain trades without serving an apprenticeship thereto: And after what Mr. Sedgwick hath said with respect to this statute, he surely will not be disposed to contend, that the man who should exercise such a trade without having served an apprenticeship according to the requisitions of that statute, would be guilty of any criminal act—any offence against conscience. He has no other alternative, than to prove as unsound, and to abandon all that he has said and contended for, upon the subject of that statute; or otherwise, to admit the truth of that position, which he hath endeavoured to disprove—that we have the option either to “abstain from a breach of the law, or to submit to the penalty,” and we will add too, “if levied.” And yet the legislature did not intend to give any such option, but meant that at all events the law should be strictly obeyed.

Sir W. Blackstone having in one place* observed, that—“Where disobedience to the law involves in it *any degree of public mischief or private injury*, there it falls within the former distinction, and is also an offence against conscience.” And in another place† having defined a municipal law to be—“A rule of civil conduct prescribed by the supreme power in a state *commanding what is right, and prohibiting what is wrong*,” Mr. Sedgwick contends‡ that “One or other of the following positions must be conceded. If, in any instance, the disregard of this rule of civil conduct be attended with *no degree of public mischief or private injury*, then is the above definition erroneous. If without adverting to the definition, we look only to the fact, the rule itself is unnecessary, and ought not to have been prescribed. If, lastly, the definition be just and correct, then cannot any municipal law possibly suffer violation, without involving *some degree of public mischief or private injury*.” And he concludes by saying, that—“Every instance of disobedience to the laws is, then, on the ground of our

* Bl. Com. v. 1, p. 58, † Ibid. 54. ‡ Rem. p. 60, 61.

'author's own reasoning, an offence against conscience.' It seems that if the learned commentator escapes without having the charge of some error or inconsistency brought home to him, it will not be for want of zeal in Mr. Sedgwick; but it will, we trust, presently be seen that it does not follow from the above reasoning, either that every instance of disobedience is an offence against conscience; or that the definition of a municipal law is erroneous. Now, in the above mentioned instance of a person exercising a trade contrary to the intention of the statute of apprenticeship, it is clear, that a municipal law would suffer violation, but yet it would involve no degree of public mischief or private injury, and consequently would not be an offence against conscience. But then, says Mr. Sedgwick, that cannot be a correct definition, which describes a municipal law to be "a rule of civil conduct, commanding what is *right*, and prohibiting what is *wrong*." In defence of that definition, however, it is to be observed, that the words right and wrong are not made use of with a reference to the intrinsic quality of the action which may be enjoined or forbidden, nor to the consequences which may be likely to follow: for—"In things naturally indifferent," as the learned commentator says, "the very essence of right and wrong depends upon the direction of the laws to do or to omit them." Now the laws may prescribe* those things, the observance of which is wholly a matter of indifference; or which may in the course of time become so, although originally essential to the public welfare; and yet to such laws the definition would apply, because the things prescribed take their complexion of right or wrong from the mere circumstance of the directions of the law with respect to them. But it does not follow, that because the laws may in that sense be correctly said to 'command what is right, and to prohibit what is wrong,' that therefore the disregard of the law would be attended with any degree of public mischief or private injury; or be in any manner an offence against conscience. The law says—and therefore in its eye—it is wrong to exercise any trade within the statute without having served such an apprenticeship as it requires, but still it is a law the non-observance of which is not an offence against conscience.

* Com. v. 1, p. 55.

vance of which would not at this day be followed by any public mischief or private injury; and consequently not be an offence against conscience. But after all, the learned commentator's definition could only be intended to be applied to just laws, and the accuracy of it would not be impeached by the circumstance of a legislature passing an unjust law, by subjecting the people to penalties for things merely indifferent; or because there are penal laws in force regulating our conduct in matters of no consequence at this day, although formerly of great moment.

When for the purpose of proving the learned commentator to have fallen into some inaccuracy, it is contended, that the definition which describes a municipal law as commanding what is right and prohibiting what is wrong, either must be erroneous; or that the disregard of such a law must be attended with some degree of public mischief or private injury; it is worthy of observation, and ought not to be overlooked, that in the very place where Sir W. Blackstone is supposing the existence of laws a breach of which would involve no public mischief or private injury, he is actually going through that definition, and commenting upon the terms in which it is couched; nay upon the identical words, "commanding what is right, and prohibiting what is wrong;" and therefore even admitting, contrary to what we have contended for above, that laws involving no public mischief or private injury, do not come within that definition; yet could not that circumstance be held to prove the definition erroneous but rather warrant a conclusion that those laws were regarded by the learned commentator as forming an exception to his general definition and as a qualification of the general doctrine.

To conclude—Sir W. Blackstone's doctrine seems to be in substance this—Where disobedience to the law involves in it no degree of public mischief or private injury we have the alternative either to abstain from what is prohibited or to pay the penalty; but where any degree of public mischief or private injury would follow a breach of the law, there the injunctions of the law must at all events be conformed to. Now the arguments by which Mr. Sedgwick hath attempted to disprove that doctrine are totally irrelevant, inasmuch as they are confined to the laws against smuggling, and other cases in which pub-

lie mischief would result from a breach of the law; for with respect to such laws, the learned commentator himself expressly observes, that there is no such choice given, and that they cannot be infringed without an offence against conscience. Sir W. Blackstone, in support of his position, had given instances of laws with respect to which the alternative was given; why then did not this gentleman, who labours to prove the weakness of that position, argue from one of those laws, instead of taking the trouble to select other laws, and laws too which are totally inapplicable? Are we to consider his conduct in this particular as *stratagem* to draw aside the reader's attention from the only true question in the case, in order to prevent the imbecility of his objections to Sir W. Blackstone's positions from being detected, or are we to conclude, that those positions have been assailed by persons to whom their real meaning was unknown. Whatever answer is capable of being given to these questions, the position themselves remain unshaken.

CHAPTER II.

WE are now come to the second chapter of Mr. Sedgwick's book, in which are discussed certain positions of the Commentaries relating to the obligation of the judges to observe former precedents.—Upon this subject Sir W. Blackstone observes,* that “The doctrine of the law is this: that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration.” But Mr. Sedgwick asserts, † that “To restrain those advisedly appointed to the presidencies of justice, to the judgments and practice of their predecessors, is not only to arraign their fitness and integrity, but to deprive ourselves of the benefits of that “experience improving on experience,” which alone can meliorate systems, or give perfection to science.” This gentleman, however, obviously contends for that which would make our judges law givers, not expounders of the law. It is not their business, but the province of the legislature—to meliorate the system and to improve the science. With respect to any arraigning of the fitness and integrity of the judges, arising from the circumstance of their being restrained to decide in conformity with the judgment of their predecessors, we must avow ourselves to be wholly unable to discern any shade of such suspicion. The duty of the judge is to determine according to the known laws and customs of the land. He swears to discharge that duty to the best of his ability. Now the existence of many of the customs which form a part of the common law, are ascertained chiefly by means of those former judicial decisions, which indicate what the law was understood to be at that time. Consequently the judge who did not decide consistently with those decisions unless they were in

* Com. v. 1. p. 70.

† Rem. p. 66.

themselves contrary to the common law, would be guilty of perjury, and no one who might possess even the most delicate sense of honour, would hesitate to accept the office of a judge, for the reason merely, that he would be bound to follow a rule which might serve as a guide to him, in observing that duty which he must swear to discharge.

The injustice and inconvenience which would result from a non-observance of the rule are unanswerable arguments in its favour. Former decisions have been received and acted upon as law by the public; titles to estates have been approved and accepted upon the strength of them, and under the conviction that they would not afterwards be disturbed; but those titles would be overturned by contradictory determinations. To subvert the doctrine which has been laid down in some adjudged cases, would be in effect to destroy half the titles to estates in the kingdom. How much would not the public be benefited by such a *melioration* of the system! Such *perfection* given to the science! How much it is to be lamented that any rule should be observed which operates as an obstacle in the way of improvements so perfect and so desirable! How much of serenity would not the non-observance of this rule be calculated to impart, to the quiet and repose of all who would then have cause to apprehend the beggary of themselves and families, by reason that any subsequent judge might cause to be regarded as illegal and unsound, that decision, upon the faith of which the title to their property depends!

'To retain rules and adhere to decisions, for no other reason,' continues the author of the 'Remarks*,' 'than because they were made centuries ago, is neither discreet nor salutary.' As if the learned commentator could possibly be supposed to mean, that those precedents were to be observed on the score of their antiquity solely, when he has himself expressly declared the object to be—"to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." It is true, that he says in the passage extracted by Mr. Sedgwick, that "Though the reason of those decisions be not obvious at first view, yet we owe such a deference

* Rem. p. 66.

† Com. v. 1. p. 69.

“to former times, as not to suppose that they acted wholly without consideration;” but he does not mean by this, as that gentleman would represent, that—“our ancestors not being supposed to have acted wholly without consideration, therefore, precedents and rules must be followed, *unless flatly absurd or unjust.*” The learned commentator has not linked together any such propositions; he means, that although the reason be not now apparent, yet the decision is not to be invalidated on that ground merely, for it is to be presumed that there was a sufficient reason for it when it was passed; but his argument for the observance of the rule does not rest upon this supposed reason, but upon the advantages of considering the decision to be law, and to govern in succeeding cases. He had previously said, that the rule admitted of exception, where the former determination was most evidently contrary to reason, and here he is to be understood to mean, that the mere circumstance of the original reason of the law not being now discoverable, is not sufficient to warrant us in concluding that it was against reason. “It is sufficient,” says he,* “that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well-founded.”

Indeed the author of the ‘Remarks’ drops an admission afterwards, to the full extent of the learned Commentator’s doctrine. ‘With regard to the ancient public usages of the kingdom, to the stable laws of property, and to those maxims of legislative policy, which time has kneaded into the frame of our constitution, the repose and serenity of civil life require that some constant and settled practice be observed.’† But in the opinion of that writer, Sir W. Blackstone hath gone too far in saying, that—“It is an *established rule* to abide by former precedents where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion; as also because the law being in that case solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast

* Com. v. 1. p. 70.

† Rem. p. 67,

“ of any subsequent judge to alter or vary from, according to his own private sentiments; he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land;” * for, says Mr. S.† “ Usage is not permitted to give efficacy to custom incompatible with equity; *Malus usus abolendus est*, is the established maxim of law. Why, then, should a juridical decision, if repugnant to the principles of sound reason and substantial justice, be declared permanent and immutable?” It seems scarcely credible that any writer should be so much mistaken as to suppose that, by the “customs of the land,” were meant those local customs which relate to particular districts—those usages, to which the maxim *Malus usus abolendus est* is applicable. The customs which are spoken of by Sir W. Blackstone are those which constitute the foundation of the common law; and one of those customs is, that if a man dies seised in fee, his estate shall descend to his eldest son. Now where a man has many children, and that estate forms his whole property, it would not probably in the opinion of the judge, be altogether compatible with equity, that such a custom should be the means of affluence to one child and, penury to all the rest; yet what man is there who could think the maxim *Malus usus abolendus est* applicable to such a case. Should any judge consider that or any other principle of the common law to be attended with injustice, it would not be for him to attempt ‘to improve that system which he is appointed to administer,’ by rejecting those principles, and for this plain reason, because it is his duty to administer, and not to improve.

But with respect to any former juridical decisions, that are repugnant to the principles of sound reason and substantial justice, so far from being permanent and immutable are they, that no succeeding judge is bound to conform to them. And why? Not because the customs of the land or common law are bad, and therefore ought to be abolished; but because it would be evident from their being contrary to reason, that they are not consistent with the common law, which is the perfection of reason, and consequently their claim to be observed, which was, that they were evidence of the

* Com. v. 1. p. 69.

† Rem. p. 68.

common law, would fail. It would be the duty of a judge in such cases, to vindicate the common law by over throwing such erroneous decisions. The learned commentator has himself distinctly said*—"This rule" (as to the observance of former decisions,) "admits of exception where the former determination is most evidently contrary to reason, much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but, to vindicate the old one from misrepresentation." It is said, however, by Mr. Sedgwick,† that the distinction taken (in the passage last quoted from the Commentaries) is not very intelligible, nor does it reduce the general rule within any apparent or discoverable bounds. That taking the term law in the sense here affixed to it, where a former determination is rejected, if that which is made to take place if it is not a new law, what is it? If the judges affirm of such prior decision, that it was not law, and on account of its manifest absurdity invalidate it, how can they be said to vindicate it from misrepresentation? In answer to the first question, it is to be observed, that the rejection of a former erroneous decision is not in itself a new law, but a vindication of the common law—the law of the land, from the misrepresentation which that erroneous decision occasioned. The former decision was a false, but the latter a true exposition of the law. Neither decision amounted to a law in itself, but each professed to be consistent with the common law of the land. When the former law, which falsely purported to declare, what the common law in that particular was became exploded by a subsequent and sound manifestation of it,—it was merely rescuing the common law from misrepresentation.

To the second question, it is answered, that by affirming that the former decision was not law, and by invalidating that decision, they are not said by Sir W. Blackstone to vindicate it, that is to say, the former decision itself, but on the contrary, to vindicate the old law or common law of the land, from misrepresentation.

The doctrine of Mr. Sedgwick appears to be, that

* Com. v. 1, p. 69, 70.

† Rem. p. 70.

former determinations should regulate, not rule:”* and it will be perhaps sufficient to remark with respect to it, that former determinations, if correct, ought to rule; but, if incorrect, ought not even to regulate.

The gentleman concludes the chapter with remarkable inconsistency, for he concedes, as it seems to me, all that he had in the preceding part of it opposed. ‘It is, he observes, † ‘truly of the highest importance that a people should repose with safety on the adjudications of those who exercise the judicial power in the state; and that, in a science so complex as that of the municipal law of a great nation must manifestly be, as much of permanence and uniformity as is consistent with the ends of justice, be preserved. This must, however, be hopeless, *unless certain avowed rules and decisions be admitted, upon the faith of which they may at all times act with promptitude and assiance*; and the recorded judgments of the courts of law and equity be of stability sufficient to instruct the ignorant, to determine the doubtful, and to serve as a sure and unfailing guide to all, in after times, who may have parallel rights to assert, and similar obligations to fulfil.’

It only remains for me, before this subject be dismissed, to take notice of the use which Mr. Sedgwick has endeavoured to make of a certain alleged dictum of the late Lord Mansfield, which had indeed almost escaped me. In support of his argument, that judges are not bound by former precedents; the gentleman hath represented ‡ his lordship to have said in the case of *Zouch ex demiss. Woolston v. Woolston et al.* that—“There are no precedents, which stand in the way of our determining *liberally, equitably*, and according to the true intention of the parties.” Such an expression as this, which has been alleged to have fallen from one of the highest characters that ever presided in our courts of judicature, would have proclaimed to the world the unworthiness of him who used it, to fill so dignified a seat. It would have amounted to an assertion, that judges are not obliged to determine according to the strict though established rules of law; but that it is permitted them to decide according as their

* Rem, p. 70.

† Ibid. p. 71.

‡ Ibid. p. 69

sentiments and feelings may direct;—according to their own private conceptions of what is liberal and equitable in every particular case. But the great Earl of Mansfield was too accurate a judge, too well acquainted with his duty, and too zealous in the discharge of it, to advance any such doctrine as that which hath been imputed to him. His observation was in terms this—“There are no precedents which can stand in the way of our determining *this* case, as it ought to be determined, liberally, equitably, and according to the true intention of the parties.”* And why *that* case? because, there were not with respect to *it* any precedents which applied. The doctrine recognized by Lord Mansfield was the very reverse to what Mr. Sedgwick has represented it; for in the very passage that immediately precedes the observation which has been just now quoted, his Lordship avows that in the case of *Rattle v. Popham*, **THIS COURT** thought themselves *bound* by *Whillock's case*; and then proceeds to observe, that in *equity* that case was determined differently; which was acknowledging that the Court had considered themselves bound by former precedents, even where the equity of the case was against them.

* Burr. Rep. 1147.

CHAPTER III.

IN the third chapter of his 'Remarks upon the Commentaries,' Mr. Sedgwick disputes the propriety of some observations of Sir W. Blackstone upon the question, whether the union of the two kingdoms of England and Scotland would be dissolved by an infringement of those points, which when they were separate and independent nations, it was mutually stipulated should be fundamental and essential conditions of such union. Before we take notice of any the arguments either of the learned commentator, or of the author of the 'Remarks,' it will be of service to state briefly the manner in which that union was effected.—In pursuance of an act of the parliament of England of the third of Q. Anne, certain commissioners were nominated on behalf of the kingdom of England.—And in pursuance of an act of the third session of the parliament of Scotland, certain commissioners were nominated on the behalf of the kingdom of Scotland to treat, of and concerning an union of the said two kingdoms.* But it was provided by those acts of parliament, That such commissioners should not treat of or concerning any alteration of the worship, discipline, and government of the church of the said kingdom as then by law established. The commissioners met, and agreed upon the articles of union. But before the treaty or union was fully concluded between the two kingdoms, an act of parliament of Scotland was passed, whereby it was declared, that the presbyterian church government and discipline should remain and continue unalterable; and that the said presbyterian government should be the only government of the church within the kingdom of Scotland. And it was ordained, that that act with the establishment therein contained should be held and observed in all times coming as a fundamental and essential consideration of any treaty or union to be concluded betwixt the two kingdoms without any alteration thereof or derogation therefrom in any sort for ever: and that in any act of parliament that should pass for concluding such union, the same should be declared to be a fundamental and essential condition in all times coming. A similar act was passed by

* Preamble to 5 Anne, c. 8.

the parliament of England with respect to the church of England. Accordingly, by the act of union of the two kingdoms,* it is enacted, 'that the act of parliament for securing the church of England as by law established, and the said act of parliament of Scotland for securing the protestant religion and presbyterian church government, be, and should for ever be held and adjudged to be and observed as fundamental and essential conditions of the said union: and should in all times coming be taken to be, and were thereby declared to be essential and fundamental parts of the said articles and union and the articles of union, and the said acts for securing the church of England, and for securing the presbyterian church government of Scotland, were thereby enacted and ordained to be, and continue in all times coming the complete and entire union of the two kingdoms of England and Scotland.' Now it cannot be denied to have been the intention of the parliaments of England and Scotland at the time of the union, that the two kingdoms should not continue united after those fundamental and essential conditions should be broken. No language could express that intention with more clearness and force.

Having premised thus much, it is in the next place to be observed, that Sir W. Blackstone, when commenting upon those articles and act of Union, gives it as his opinion†—"That the two kingdoms are now so inseparably united, that nothing can ever disunite them again, except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which when they were separate and independent nations, it was mutually stipulated should be *fundamental and essential conditions of the union*." And in a note to the same passage he says, that—"It may justly be doubted, whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union: for the bare idea of a state, without a power somewhere vested to alter every part of its laws is the height of political absurdity." But the author of the 'Remarks' is disposed to deny that the parliament of Great

* See 5 Anne, c. 8. † Com. v. 1, p. 97.

Britain, has any power to alter the constitution of the two churches which were made fundamental conditions of the union. 'Although,' says he,* 'it may be, and is expedient, that a community should contain within itself the means of new modelling its local adjustments, and making provision for its own exigencies, it does not therefore follow that this alterant power should extend to all those accords and conditions which are in the express terms of its alliance and conjunction with a separate province.' That a power of modelling local adjustments does not necessarily induce those accords and conditions alluded to, must be conceded to Mr. Sedgwick: but the admission will not assist him; for the proposition itself is no less inapplicable to the matter in debate than it is self-evident. The questions to be considered are of a different kind; as, amongst others—Is it not competent to the sovereign power of every state in the exercise of its power of making laws to alter the constitution of its church establishments? Are not the same powers of parliament with respect to the churches of England and Scotland, by which the constitution of those churches was first established, competent to their alteration? Do not those powers still subsist? Was it in the power of the two parliaments which existed at the time of the union to abridge the authority of future parliaments? Is not the parliament of Great Britain the parliament both of England and Scotland? And now that they are represented by one parliament, is the power of that parliament with respect to the power of making laws in regard to the government and regulation of each state, less in any respect than it was when it was the parliament of Scotland or England only? To maintain the negative of these propositions, is of the number of the difficulties which Mr. Sedgwick has to surmount; but that gentleman argues as if he looked upon the point to be—whether the alterant power of one state can extend to alter the terms which have been entered into between that state and a separate one, for an alliance and conjunction between them: as, put this case—suppose the kingdom of Scotland had agreed to unite with England, and to submit to the parliament of England as then con-

* Rem. p. 73, 74.

stituted, but under certain restrictions and exceptions, as the preservation of the presbyterian church, for example, it would be plain that the parliament of England would have no greater power to alter the presbyterian worship in Scotland, than to determine what religion should be established in any foreign state. It would, as to those restrictions, resemble the case of a federate alliance. The two states could never be completely incorporated in one; for the legislative power of the principal state would have no absolute right of legislation over the other. But here the case is totally different; for Scotland is represented by a parliament as well as England: and when an act of parliament passes which concerns Scotland, it is the parliament of Scotland giving laws to Scotland; or, which comes to the same thing, it is the parliament of Great Britain giving laws to that part of Great Britain called Scotland: and when such an act particularly relates to England, it is the parliament of England giving laws to England; or it is the parliament of Great Britain giving laws to that part of Great Britain called England: for by the third of the articles of union—"The *united kingdom* shall be represented by *one* parliament." But in such an union as that between Scotland and England there is a complete incorporation; neither state can have a separate existence. Bishop Warburton* observes, that in such an incorporate union the two contracting parties are totally annihilated, without any power of revival; and a *third* arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must reside. 'But (asks Mr. Sedgwick †) does this right of legislation necessarily include the right arbitrarily to violate the positive and essential stipulations which have been made the basis of such incorporation?' Which shall be answered, by inquiring whether the parliament of 1803 is not as competent to do away the things stipulated for, as the parliament of 1707 was to stipulate? Scotland is now, as she was then, represented by a parliament. So is England. Will the gentleman inform us, whence the parliament of 1707 derived the power of preventing an equally extensive exercise of the rights of sovereignty by the parliament of 1803? It would

* Warb. Alliance, 195. † Rem. p. 74.

be insulting the learned reader's understanding to attempt to prove the truth of a proposition so evident, as that the power of the legislature is not less now than it was a century ago; but if any student requires some authority, he will find one in Lord Coke.* With respect to the words *arbitrarily to violate*, it is a mere begging of the question; for if the parliament has the power to alter, the exercise of that power would not be an arbitrary violation.

'Wherefore is it,' continues Mr. Sedgwick,† 'that such political alliance should become tantamount to an utter extinction of the states whose interests are meant to be consolidated; and what is the nature of that artificial third sovereignty, thus rising from the ashes of its exanimate parents?' The answer is, that considered as separate states, they are utterly extinguished because united in one, and under the same sovereignty, as being represented by one parliament. The nature of the *third* sovereignty, is the same as of all other sovereignties; the sovereignty of Great Britain includes in it the power of giving laws to Great Britain, as the sovereignty of Scotland or England, when separate states, possessed the power of giving laws to Scotland or England.

By way of illustrating his reasoning in the note above referred to, Sir W. Blackstone observes,‡ that "An act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless, in point of authority, be sufficiently valid and binding; and notwithstanding such an act, the union would continue unbroken." But upon this sentence Mr. Sedgwick remarks §—that 'It does not seem readily demonstrable how any solemn pact can be preserved inviolate and *unbroken*, consistently with the infraction of its declared and most fundamental covenants.' Now, if that gentleman's observation is intended to amount to nothing more than this, that the terms and conditions of the union cannot continue to be the same after an alteration has been made in them; why it would be equally futile and unnecessary to refuse to admit the accuracy of his remark; but, if he means

* 4 Inst. 43. † Rem. p. 74. ‡ Com. v. 1. p. 98. in a note
§ Rem. p. 75.

that the union cannot continue, as to some articles, after others of them which were at the time declared to be fundamental conditions, are removed, (and which is the point at issue,) then, the union may continue notwithstanding some of those conditions should cease to exist; and it is demonstrable in this way—The parliaments of 1707 could not guarantee that those conditions should be observed as fundamental conditions by all succeeding parliaments.* The same right that the parliament of 1707 had to make them conditions, has the parliament of 1805 to dispense with those conditions; and to cause the continuance of the union notwithstanding their absence. And in so doing the parliament of 1805 would be guilty of no unjustifiable infraction of the treaty, no arbitrary violation of its stipulations,—because the parliament of 1707 had no authority to bind future parliaments to the observance of those conditions, as fundamental, essential, and inseparable from the union itself. Does Mr. Sedgwick, or any other man, doubt, that the king, lords and commons in 1805 have as great a right to dissolve the union altogether, as the queen, lords and commons in 1707 had to agree upon that measure?† Then, if that be so, who will dispute that they have not now the power to alter the terms of the present union? Who will say, that such an alteration must at all events be of itself the dissolution of the union contrary to the intention of the existing legislature.

That gentleman adds, that ‘it is not perceivable how ‘the above language’ (with respect to the union continuing unbroken) ‘can at all be reconcileable with the context, in which it is expressly said,’ that “Upon these ‘articles and act of union, it is to be observed, first
“that the two kingdoms are now so inseparably unite
“that nothing can ever disunite them again, except the
“mutual consent of both, or the successful resistance
“of either, upon apprehending an infringement of those

* 4 Inst. 43.

† It will, at the bottom of this chapter, be submitted, that in consequence of the coronation oath, the consent of the crown could not be had to any act for an alteration in the constitution of either of the churches of England or Scotland; but it is necessary to discuss the present question, without adverting to any arguments suggested by that obstacle.

" points, which, when they were separate and independent nations, it was mutually stipulated should be fundamental and essential conditions of the union. Secondly, that whatever else may be deemed fundamental and essential conditions, the preservation of the two churches of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be."* But how does it appear that the positions are at variance?—what contradiction is there in saying, in one place, that the union of the two kingdoms will continue notwithstanding an alteration in some of the conditions of the union, and, in another, that the two kingdoms cannot be disunited except with the mutual consent of both? They rather support than contradict each other; for if the mutual consent of both kingdoms be indispensably necessary to disunite them, then will not such disunion result from the mere infringement of certain fundamental conditions: and on the other hand, if the infringement of those fundamental conditions will not of itself dissolve the union; still, the mutual consent of both may be said to be competent to the purpose, without contradicting the assertion that such an infringement would not have that effect. There is nothing irreconcilable between the assertions that the union would continue unbroken notwithstanding such an infringement; and that it might be broken by the successful resistance of either kingdom upon apprehending such an infringement; for the position of Sir W. Blackstone is, that the infringement will not *of itself* dissolve the union—and there cannot be any absurdity in saying, that such an infringement will not dissolve the union, at the same time that it is admitted, that it might give rise to a resistance, which, if successful, would dissolve it. The difference is manifest; for if the act itself amounted to a dissolution, then would such resistance be justified; but if the act itself does not amount to a dissolution, then the union continues, and resistance is rebellion. In the one case the union would be destroyed; in the other only endangered.

* Com. v. 1. p. 97.

The only remaining observation which this chapter of Mr. Sedgwick's book contains, appears (it is hoped and believed unintentionally) to cast something like a stigma upon the moral character of the learned commentator. 'Whether the union would be destroyed, or simply endangered by the peremptory infringement of its primary conditions, Sir W. Blackstone seems,' says that gentleman,* 'to have formed no very decided opinion as to the *injustice* of the experiment: his language, 'if it does not *openly countenance* such an infraction, 'does but *faintly* and *equivocally* censure it;' and to support that assertion he quotes the few following lines from the end of the note above referred to, where it is said that—"It should seem neither prudent, nor *perhaps* consistent with good faith, to venture upon either of those steps, by a *spontaneous* exertion of the *inherent powers* of parliament, or at the instance of mere individuals."† Now I cannot forbear to observe, that it was highly censurable to attempt to charge the learned commentator with having formed no decided opinion upon the injustice of such a proceeding; and no less extraordinary, that the above passage should be adduced with the view of substantiating it, when in the very outset of the identical note in which that passage is to be found, Sir W. Blackstone distinctly says, that such an infringement would be—"a *manifest breach of good faith*, unless done upon the most pressing necessity." In what manner will Mr. Sedgwick justify himself, for having asserted in the face of this explicit declaration by the learned commentator, as to the injustice of such a proceeding, that the learned commentator's language, if it does not *openly countenance*, does but *faintly* and *equivocally* censure it? When Sir W. Blackstone says, a few lines below, in the same note, that "it would not perhaps be consistent with good faith," the object of his using the qualifying word *perhaps* evidently is to guard the expression from being taken to express a positive opinion, that it would in all cases and under all circumstances be inconsistent with good faith, seeing that there might possibly exist such a pressing necessity for the measure as would render

* Rem. p. 75. † Com. v. 1, p. 98, in a note.

it justifiable, and consequently not inconsistent with good faith.

An observation of the late Mr. Burke is, in the next place, cited by the author of the 'Remarks'* to the effect that—"Neither the few nor the many have a right to act "merely by their will in any matter connected with duty, "trust, engagement, or obligation." The truth of which is admitted; but its application to the question in dispute denied; for that question is, whether the legislature of Great Britain has a *constitutional power* without the consent of the English church or the kirk in Scotland, to alter any of the conditions which were entered into respecting the constitution of those churches at the time of the union? And not, whether they have any right to do so *merely by their will*? As supposing that there should exist a pressing necessity for the measure, have not the legislature power to carry it into effect?

It is said also that 'When we speak of such spontaneous acts of power as prudence might hesitate to exert, we evidently refer not to a moral competency to vary, but to a physical power to overrule, the most express fiduciary stipulations.' But the meaning of the learned commentator, in using that expression, is evidently very different, for he had immediately before observed, that an alteration might be safely and honourably pursued if respectively agreeable to the two churches; and in saying, that it would be imprudent to venture upon either of those steps by a *spontaneous* exertion of the *inherent powers* of parliament, the signification plainly is, that it would not be prudent (although they possess a moral competency) so to do *of their own accord merely*, without the consent of those churches.

Upon a review of the whole, the learned commentator's opinion upon the subject seems to be, that the two kingdoms cannot be disunited except by the mutual consent of both, or by the successful resistance of either, upon apprehending an infringement of those points which at the time of the union were declared to be fundamental and essential conditions. That any alteration in the constitution of either of the churches of England or Scotland would be an infringement of those conditions. That such

* Rem. p. 76.

an infringement, however, would not of itself destroy the union, although it would be a manifest breach of good faith, unless done upon the most pressing necessity. That the legislature of Great Britain has a constitutional power to repeal or alter the constitution of either of the churches. That it would be a manifest breach of good faith to exert that power without there existed the most pressing necessity for it; or without the approbation of the respective churches. That with such approbation the measure might be safely and honourably pursued; but that to venture upon it by a *spontaneous* exertion of the powers of parliament—in other words, by an exertion of those powers without the previous consent of the two churches, would be imprudent, inasmuch as it might raise such a ferment in the minds of individuals as might urge them on to resistance, and so *endanger* the union. So far in defence of Sir W. Blackstone's observations upon the subject of the union.

Before I conclude this chapter, I shall presume to offer a few further observations with the view of shewing, that parliament has a constitutional power to make the alterations above spoken of, but that there is at the same time an obstacle to its being done; and that that obstacle forms the best security against any innovation. First—the kingdom of Great Britain comprehending both England and Scotland, and governed but by one and the same parliament, possesses the rights of sovereignty and legislation in as full force with respect to Great Britain, as (when separate states) the kingdom of Scotland did with respect to Scotland, and the kingdom of England with respect to England; for the parliament of England or of Scotland of 1707 could have no authority to prevent the sovereign power of 1805 from exercising any of the rights of sovereignty. They had no power to prevent the parliament of Great Britain from exercising the legislative power over Scotland, when Scotland should form a part of Great Britain and be represented by the parliament of Great Britain; nor over England, when England in like manner should form a part of the same kingdom and be represented by the same parliament. The same right that the parliament of 1707 had to impose those conditions has the parliament of 1805 to remove or alter them. If the sense of the people of the respective kingdoms had been taken, and the union had been

acceded to upon the conditions above specified, then it might be argued that the inherent power of parliament would not be competent to any such alteration, upon the ground that those conditions could only be removed by the same consent with which they were imposed: but the union was effected without any means taken to ascertain the collective sense of the people, that is, in other terms, by the inherent powers of parliament. The inherent powers of parliament are sufficiently strong, therefore, either to disunite altogether, or to alter the conditions of the union. Supposing the parliament of Great Britain should think it expedient to alter the constitution of the church of England, does any one doubt their power so to do without destroying the union between England and Scotland? will any one be found to contend, that such an alteration would *of itself* destroy the union? That church was established by the authority of parliament; surely then parliament may alter the nature of its establishment; and so with respect to Scotland.* If either Scotland or England had surrendered its legislative rights to the other upon certain conditions at the time of the union, then certainly there would be more room to contend that any infringement of those conditions would have destroyed the union; but, by the terms of union, one kingdom does not make laws for the other, but *each is represented* by the parliament of Great Britain. Each, if they can be in any way looked upon as separate states, has a parliament continuing—a parliament equal in power and in right to alter any of its laws. It is true that the representatives chosen by England are much more in number than those sent by Scotland, but still each member, when chosen, is the representative of the whole kingdom of Great Britain, and is sworn to promote its general interests.

Although, however, there is nothing in the acts of union which can curtail the powers of parliament so as to prevent their making an alteration in the terms of that union, the coronation oath presents an insurmountable obstacle to any bills' receiving the royal assent for that purpose; for in pursuance of the two statutes above mentioned which were passed previously to the ratifica-

* See below with respect to the coronation oath,
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tion of the union—the one of Scotland enacting that every king, at his accession, shall take and subscribe an oath to preserve the protestant religion and presbyterian church government in Scotland—the other of the parliament of England, enacting that at his coronation, he shall take and subscribe a similar oath, *to preserve the settlement of the church of England* within England, Ireland, Wales, and Berwick, and the territories thereto belonging. Every king of Great Britain when he takes the coronation oath, swears to preserve unto the bishops and clergy of the realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them. It would therefore be impossible that the consent of the crown could be had to any such measure; at all events, it would be necessary, as a preparatory step, to alter the form of the coronation oath in order that succeeding princes might not be under any such restraint. Indeed it is not to be supposed, that the consent of the crown would be given to any bill which might pass the two houses of parliament for such an alteration of the coronation oath, because to pave the way for any change in either of the churches, would obviously be to depart from the spirit, at least, of that oath, by which it hath been engaged that there *shall be preserved* to those churches all their rights and privileges.

Some reasoning arises from the above considerations which might be brought to bear upon a topic which hath been much agitated of late: but it would be inconsistent with the plan of this work to enter into any discussion of that subject.

CHAPTER IV.

THE former chapters of Mr. Sedgwick's book consist of Remarks on certain Doctrines which are advanced by Sir W. Blackstone in the Introduction to his Commentaries on the Laws of England; but we are now to take notice of some criticisms on the first chapter of the Commentaries themselves, which treats of the absolute rights of individuals.

After having offered some observations upon the sentiments which others have entertained upon the subject of the rights of man, the author of the 'Remarks' at length controverts the doctrine contained in the following passages in the Commentaries.* "The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish." The gentleman first complains of the use of the term *natural liberty*.—"The comprehensive term, *natural liberty*," (says he,†) "is itself, so lax and indefinite, and is withal so open to quibble and contention, that we shall in vain endeavour to collect from it any adequate notion of the true nature and origin of those absolute rights which it is said to comprize." That natural liberty is a term

* V. 1, p. 125. † Rem. p. 87.

open to quibble, if not to fair contention, no one who has perused this part of Mr. Sedgwick's 'Remarks' will, it is presumed, be disposed to deny: but we cannot admit that it is lax and indefinite as used in the above passage, and that it is impossible to collect from it an adequate notion of the nature and origin of the rights which it comprises; for the learned commentator has given a sufficient definition of it, in saying that "it consists properly in a power of acting as one thinks fit without any restraint or control unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will." Indeed the gentleman himself appears to have expressed the signification of the term, *natural liberty*, in other words, when he asserts* 'that every man has by nature a right to promote his own happiness, and to seek his own advantage, by every means not immoral nor productive of injury to others.'

But Sir W. Blackstone's doctrine, that this right or any part of it is relinquished upon entering into society, is pronounced to be pernicious and false. 'That this natural right,' says the author of the Remarks,† 'or any part of it, is relinquished as the purchase-price of the benefits conferred by society, is a doctrine as pernicious in theory as it is false in fact.' He does not, however, attempt to point out either its unsoundness, or evil tendency, as it seemed to be incumbent on him to do; and it will be sufficient therefore, merely to observe, what no one will dispute, that upon entering into society every man submits to be governed by the laws of that society; and in so doing relinquishes the right which he had by nature of regulating himself according to his own judgment. In a state of society he is not at liberty to exercise the right which he had by nature, of choosing those measures which *appear to him* to be most desirable, although they might not be in themselves immoral, nor in his sight productive of injury to any, provided society, with a view to the general welfare, should think it necessary to interdict the use of those measures.

* Rem. p. 87.

† Ibid.

It is said also, that the learned commentator's reasoning on this subject is at variance with itself; because he first asserts, that the absolute rights which he has just now affirmed to constitute, and to be denominated the natural liberty of mankind, "were vested in them by the immutable laws of nature,"* and then adds—"Hence it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of mankind."† To point out the variance which he has alleged to exist in the above passages, the author of the 'Remarks,'‡ asks—"Can it consistently be asserted, that men surrender, on entering into political communion, any portion of those rights, which by the *immutable laws of nature* are vested in them: and the maintenance of which is declared, at the same time to be the leading view and designated end of its establishment?" That the principal aim of society is to protect individuals in the enjoyment of their absolute rights, is not disputed by the gentleman. The enigma which so much perplexes him, consists, it seems, in its having been asserted, that individuals *surrender* any portion of those rights *with the view of preserving them*. To explain this, it is to be observed, that in an uncivilized state man is not restrained otherwise than, as he is morally bound to conform to the will of God, from acting as his will dictates. If in defiance of those laws, the strong should be inclined to injure the weak, the latter would be at the mercy of the former, inasmuch as there would not be any power to which recourse might be had for protection. If a dispute should arise between two individuals, it would be decided not by the laws of justice, but by the law of the strong over the weak, for want of a tribunal to administer justice between them; and to which both should be bound to submit. Insecurity therefore must ever attend such a condition. The obvious remedy for this is for individuals to associate, and by their united strength to protect the rights of every associated member; but, if, in such a state of union, each individual continued to possess his natural right of acting as his will would prompt him, society would have been instituted to no purpose. It therefore became necessary for every man, upon entering into society, to engage to

* Com. v. 1, p. 124. † Rem. p. 87.

forego the enjoyment of, or surrender, his natural right of doing whatever he pleased, and to act in conformity to the laws which speak the will of the society. But in so doing he does not abandon any one specific natural right; he merely throws his portion of natural liberty into the general stock; in order that society which is the depository and guardian of it, may again deal out to him the fullest measure possible, reserving only so much as it deems necessary for the preservation, and perfect enjoyment of that part which each individual can be permitted to possess. He consents to conform to the will of the general body, that others may be assured that no danger exists to them from the exercise of his natural right; and he has a sufficient motive to do so because he sees his own security in the measure, inasmuch as all others submitting themselves in like manner, he can have nothing to fear that from the exercise of *their* natural rights, he will suffer any molestation in the enjoyment of such of his own as he can be permitted to retain. Considered in the above light, there does not appear to be any inconsistency in saying, that every man when he enters into society, gives up a part of those absolute rights which constitute natural liberty; and, that the first and primary end of human laws is to maintain and *regulate* those absolute rights; for it is not an extinguishment of those rights, but a fiduciary deposit of them in other hands, better able to insure the peaceable enjoyment of them by the surrenderor.

The learned commentator hath not asserted, as one might be led to suppose from perusing Mr. Sedgwick's observations, that political constitutions 'require the dereliction of the absolute rights of man:' nor that they were 'ordained for the unimpaired enjoyment of those rights.'¹ Instead of—either a dereliction upon entering into society, which would imply an utter abandonment of those rights, in which natural liberty consists, or society being intended for the unimpaired enjoyment of those rights he expressly says* in the following passage (what will preclude every supposition as to his having had any such meaning,) that "the liberty of a member of society, is no other than *natural liberty* so far restrained

* Com. v. 1. p. 125.

“ by human laws (and no farther) as is necessary and expedient for the general advantage of the public.” Having vindicated the text of the learned commentator from this imputed solecism, it only remains to observe that there is not any inconsistency in its being said that their absolute rights were vested in individuals by the immutable laws of nature, and that some portion of those rights are given up upon entering into society; for in saying that those rights are vested in individuals by the *immutable* laws of nature, the expression does not admit of the signification which the author of the ‘Remarks’ would put upon it; that is, that the rights are immutably or unalterably vested and fixed; but the meaning is, that *the laws* are immutable and unchangeable; and being so, continue to give those rights to every succeeding individual. What contradiction can there be in saying, that man, on entering into society, surrenders a portion of those rights which are vested in him by laws, which laws continue invariably the same; and the learned commentator’s expression has no other import, for the word ‘immutable’ evidently refers to the laws of nature, and not to the rights which those laws confer.

Mr. Sedgwick, in the next place, questions the accuracy of Mr. Burke’s sentiments* upon the subject, according to which—“ Man cannot enjoy the rights of an uncivil and of a civil state together. That he may obtain justice, he gives up his right of determining what it is in points the most essential to him: that he may secure some liberty, he makes a surrender, in trust, of the whole of it.” In laying down that doctrine, the author of the ‘Remarks’ conceives that Mr. Burke has carried the principle which Sir W. Blackstone hath adopted to a much greater extent; but there will not be found any difference in substance between them. Indeed, the former seems to think that the view which the latter hath taken of the subject may be the most correct, as we shall presently see. Both agree that the principal end of civil society is to protect individuals in the enjoyment of their absolute rights. Both agree that civilized man possesses many of the same immunities that he was entitled to exercise in an uncivil state; and that it is to

* Reflections, p. 88.

secure to him the peaceable enjoyment of some of those immunities, that society retains the remainder. Mr. Burke does not mean that man cannot enjoy in a civil state many of the same immunities which he possessed in the natural; but that he enjoys them under the sanction of civil society, and not by a natural right. He conceives, that in a state of civil society man cannot be said to have the exercise of his natural liberties, since society has authority to curtail them, so far as the good of the community may require. There appears to be great accuracy in Mr. Burke's doctrine, that "to secure some liberty, man makes a surrender, in trust, of the whole of it;" for, as, upon entering into society, he does not relinquish any specific natural right, upon condition of his continuing to enjoy the remainder of his natural rights, but, on the contrary, as society hath the power to restrain him in the exercise of any or either of those rights, the abridgment of which it may deem necessary for the common good, it seems to be a correct view of the subject, which thus regards such of the immunities, as we should have possessed out of society by virtue of a natural right, and which we enjoy in the social state, *as the rights of a civil state*; as well as, that upon entering into society, man makes a surrender, in trust, of the whole of his natural liberty.

It remains to shew that the learned commentator thought that the view which Mr. Burke has taken might be the true one; and, for that purpose, it will be sufficient to point out to the reader, that the former writer, where he speaks of the rights of Englishmen, as defined by several statutes, observes,* that they will "appear to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those *civil privileges*, which society hath engaged to provide, *in lieu of the natural liberties* so given up by individuals." So in another place † the learned commentator says, that the right of private property, as it is possessed in society, is one of those "*civil advantages* in exchange for which every individual has resigned a part of his natural liberty."

* Com. v. l. p. 129.

† Ibid. p. 138.

But in order to prove the unsoundness of Mr. Burke's doctrine, that 'Man cannot enjoy the rights of an uncivil and of a civil state together,' Mr. Sedgwick says* that—'The God of nature allows to every created being to exercise, without coercion, those faculties with which he is gifted; and to enjoy without constraint, those blessings with which he is endowed, *so long as* he continues to exert the one and enjoy the other, without detriment to his fellow-creatures or himself; and that this seems to be the sum and extent of natural freedom.' According to this hypothesis, then, man does not retain his natural liberty after any exercise of it in a manner injurious to others or himself, for it is only to continue *so long*. The gentleman, however, has forgot to show *how* man becomes restricted in the exercise of his faculties, and in the enjoyment of his blessings in consequence of such injustice. Certain it is that there is no human power to impose such restraint, for out of society all men are equally free. That such injustice would be contrary to the will of his Creator is not to be disputed; but that the Creator limited the exercise of his faculties to the duration of their being justly exercised, is a notion palpably incorrect; for man is endued with the faculty of free will, and is to account in another life with his Creator for his conduct in the present. If an individual, not living within the pale of society, should be disposed to run counter to the divine laws, there obviously would not exist any human power which could restrain him in the exercise of his faculties, and the enjoyment of the blessings with which he is gifted. Mr. Sedgwick seems to have confounded together the natural liberty or unrestraint which, in consequence of his being endued with free will every man possesses, and the moral duty arising from the law of God. In other words, he has not discriminated between the obligation to regulate his conduct by the directions of the divine will; and the liberty which he possesses of acting according to *his own* will, if he should be wicked enough to defy his Creator's displeasure. God has given him the election of acting either justly or unjustly—of abusing, or making a commendable use of those faculties with which he is gifted;

* Rem. p. 88.

but in order to induce mankind to act with uprightness, has promised rewards to him who discharges his duty; and has denounced punishment against him by whom that duty may be violated.

In any other signification than as a convertible term for *power*, man certainly does not possess the *right* of exerting his faculties in any way detrimental to his fellow-creatures or himself; for when rights are spoken of, you in strictness ought to couple the moral obligation with the physical ability. But should he conduct himself with injustice towards others, it is plain, for the reasons above given, that he might notwithstanding continue in the unrestrained exercise of his faculties, and enjoyment of the blessings which have been bestowed upon him; for it is in a future state that he must render up his account; and out of society there is no human tribunal before which he can be amenable. Unless when in a state of civil union every individual is to decide for himself what is justifiable; but as a member of civil society he is not at liberty to act according to the dictates of his own judgment, but as the laws of that society of which he is a member shall direct; as therefore, upon entering into society every man's conduct must necessarily be subject to the restraint of the laws, it follows, that such of those immunities which he exercises in society as resemble his natural rights, are not held in right of nature, but by the permission of society.

Mr. Sedgwick, however, although he has defined natural liberty to consist in 'the exercise without coercion of those faculties with which he is gifted,' seems afterwards to deny that the rights of men have any existence previously to their entering into society, for he says*—'As *the rights of men* arise out of that reciprocity of social duties which attach to their common relation, it is plain, that *until they are united in society, these rights can have no existence*, since out of that state they could not be recognized.' That those rights which arise out of a *reciprocation of social duties* can have no existence before men become united in society, is plain indeed; for it is in effect saying, that civil rights could not be possessed before they existed! But to assert, (and the passage imports

* Rem. p. 88.

as much,) that the rights of men do not exist out of society, in other words, that before he entered into society man was without rights, is an absurdity; for whether they could be recognized by others or not, would not affect his title to them. Strictly speaking, the rights which he enjoys, after entering into society, are the rights of a citizen; but then he had rights *as a man* before he became a citizen.

The most extraordinary circumstance, however, is, that such an assertion as that the *rights of man* can have *no existence* UNTIL they are united in society, should be intended by the author of the 'Remarks' to form part of an argument to prove that men can enjoy the rights of a civil and uncivil or natural state together. So that the gentleman's argument resolves itself into this sage remark—mankind may enjoy the rights of a civil and uncivil state together, although in an uncivil state he can have no rights! Indeed there is a strange contradiction in this part of Mr. Sedgwick's argument, for in the very passage which precedes the above, he says, that 'every created being is by nature allowed to exercise without coercion those faculties with which he is gifted,' &c. which is admitting that every such being has by nature a right to the exercise of those faculties, a right inherent in him by birth, and consequently capable of existence out of society. So in the very next passage to that in which he asserts in effect, that the rights of men have no existence out of society, he actually speaks of the *practical exercise* of such rights; but how are they to be practically exercised when and where they do not exist? In fact, he distinctly says in another page,* 'that the natural rights of mankind do not owe their being to political arrangements.' How harmoniously does this last assertion chime in with the above, that 'the rights of men arise out of a reciprocity of social duties, and that they can have no existence until they are united in society!'

'Whatever, in the practical exercise of them,' says Mr. Sedgwick,† 'a man might rightfully do in that imperfect condition of his being, which precedes the due settlement and distribution of political authorities, he may do, in like manner, when the foundations of political union are firmly laid.' The assertion, however,

* Rem. p. 90.

† Ibid. p. 88.

might be proved to be unsound by a hundred instances. Take one example: before the institution of society, connexions might be rightfully formed between the sexes without the civil restraint of marriage; afterwards not. But admitting the position, it does not go any way to show that if a man does in a state of society what he might have done out of that state, that what he so does is by virtue of a natural and not of a civil right. If we should concede to the gentleman that 'the various political rights which result from the complex duties of civil relation are superadded to those of nature, and are not destructive of them,'* he would gain nothing upon which to found an argument against Mr. Burke's position; for it would not follow that those rights which belonged to him from his birth, were, after his entering into society, exercised by virtue of a natural right: or rather that they were not exercised by the permission of society.

There is reason to suspect that Mr. Burke is not accurately understood, because he does not deny that men have a right to do in the social state the same things which they might have done in the natural, and that too at the same time that they exercise those rights which do not exist apart from the civil state. All that he means is, that what they might have done in an uncivilized state, upon the ground of a natural right, cannot, after the institution of society, be done in virtue of that natural, but if done at all, it must be in the exercise of a *civil* right. Mr. Sedgwick admits† that 'the trust of providing for and protecting the rights of nature is confided to other hands; that each individual, reposing in the might and activity of the public arm, and the equitable arbitration of public tribunals, refers his wrongs to be redressed by the one, and his claims to be decided by the other: ' but still he says that 'Mr. Burke's inference is not admissible;' although, in saying that the trust of providing for the natural rights of individuals is confided to the public, and that each individual refers his wrongs to be redressed by the public arm, and his claims to be decided by the public tribunals, he seems to fall into Mr. Burke's doctrine, that "to obtain justice, man gives up the right of determining what it is;" for if he refers his wrongs to

* Rem. p. 88. † Ibid. p. 88 and 89.

be redressed by the public arm, and his claims *to be decided* by the equitable arbitration of public tribunals, it is palpable that he *gives up* that right of redressing his wrongs and deciding upon his claims *himself* the moment that he refers them *from* himself to the public.

The author of the Remarks asks*—‘ Does not Mr. Burke, besides, expressly disclaim his own doctrine, when he tells us, and that too in the very next sentence, that “ Government is not made in virtue of *natural* rights, which may and do exist in total independence of it?” Now no reflection can be requisite, before a positive answer in the negative is given to such a question; for the doctrine is, that man cannot enjoy the rights of an uncivil and of a civil state together; but where will there be found a second person disposed to consider that doctrine as having been disclaimed by an assertion, that natural rights may and do exist in total independence of government or society? Surely there can be no contradiction in saying, in one place that two things (*viz.* natural and civil rights) cannot be enjoyed together, and in another place that one of those things (*viz.* natural rights) may be enjoyed alone, and in total independence of the other. That expression of Mr. Burke, so far from disclaiming, serves to illustrate his doctrine, which is, that natural rights can only be enjoyed out of society; and that in society, all rights are civil rights.

Mr. Sedgwick proceeds to criticise some other propositions of Mr. Burke, and it is conceived with no better success. “ One of the first motives to civil society, (says that admirable writer) and which becomes one of his fundamental rules, is, *that no man shall be judge in his own cause.* He abdicates all right to be his own governor—he inclusively, in a great measure, abandons “ the right of self-defence, the first law of nature.”† Upon which Mr. Sedgwick observes, ‘ that no man should be a judge in his own cause, is indeed, a maxim in society, but could not be a motive originating it.’‡ It will be here contended, however, that it is one of the *first* motives to civil society. What is the chief aim and end of society but the protection of individuals? Against what are they to be protected but the misconduct of

* Rem. p. 89. † Reflections, p. 88. ‡ Rem. p. 89.

others? How is that protection to be obtained, but by compelling individuals to act in conformity to the laws, or, to use the gentleman's own words, to 'refer their claims to be decided by the public tribunals,' and so preventing them from being judges in their own cause? Every individual sees his security against the misconduct of others, in their not being permitted to act according as their private inclinations would direct them. It is that misconduct alone which in a natural state the peaceable man has to dread: The first motive to civil society, therefore, is to disarm man of the power of acting in his own cause, as he would be impelled to do by the dictates of his own partial judgment, and 'by referring his wrongs to be redressed by the public arm, and his claims to be decided by the public tribunals,' to place his conduct under the restraint and regulation of the laws.

'To be a judge in his own cause,' continues Mr. Sedgwick, 'so far from being the first fundamental right of uncovenanted man, is not in its nature a right; nor if it were, could it be at all enjoyed, since its very universality must necessarily destroy it. The same prerogative which belonged to the complainant, must belong equally to his antagonist; some arbitrator must consequently be resorted to; the instant such arbitrator is appointed, the right to assert his own cause is as effectually abdicated by the parties appellant, as it ever can be under the most artificial institutions of government.'"* This notion of arbitration can only be advanced to shew that if a man has the right, he cannot enjoy it, for he must be in possession of the right before he can abdicate it. It is admitted that the same prerogative belongs equally to all, but it is preposterous to suppose that uncivilized men would resort to arbitration. Is it at all probable that in that state the parties litigant would submit to the decisions of a third person? Would any man reposing in the confidence of his own strength over his antagonist, possessing in himself the power to support and maintain his own claims, and anxious of course that they should prevail, is it to be believed that a man so circumstanced would hesitate to exert his own adequate means? Is it at all credible, that waving them,

he should consent to submit to the award of another, which must be at least precarious as to a determination in his favour? Besides, supposing the award of such an arbitrator to be obtained, what is to prevent the strongest of the two from afterwards standing up to assert his own cause, and refusing to be governed by that determination? Moreover, a reference to arbitration must presuppose a state of civil intercourse and of considerable refinement too. Who would they select upon the ground of integrity? how should integrity be known but by the uprightness of his dealings and transactions with others? Whoever has been in the way of knowing how little awards in general are to the satisfaction of the parties themselves, and oftentimes of either party, how little they accord with their own partial opinions as to the justice of their own claims, will not be disposed to believe that where there would be no laws to enforce the observance of awards, there would be any observance of them at all. It comes forcibly to our recollection, and in truth opportunely enough in this place, that this very writer, who now maintains that in an uncivilized condition men would refer their disputes to arbitration, has asserted in a former page,* that men in their uncivilized condition *are all but quadrupeds*. According to this gentleman himself, then, two uncivilized men would be as likely to adopt that mode of conduct which he supposes, and refer their disputes for the decision of a third, as would an ass and a mule, or a wolf and a tyger! Such, and so absurdly inconsistent are the arguments which have been advanced to refute the reasonings of a Blackstone and a Burke!

Mr. Sedgwick proceeds to observe, that 'to retaliate the injuries we may receive, as it is the reverse of our duty, cannot be our right. Every one is enjoined, by the rules of justice, to compensate the loss or damage avoidably occasioned to another; such compensation, therefore, becomes the right of the sufferer.† These observations are certainly conformable to religion and the law of society; but the misfortune is, that in an uncivilized state, it is matter of individual opinion what our duty enjoins. If two individuals were to dispute about their right to a thing, each would maintain that he had

* Rem. p. 2.

† Ibid. p. 89.

an equal claim with the other, and there would be no appeal but to corporeal force.

With respect to the right which sufferers would have to a compensation for any loss they might sustain, whether they have such right or not, or whether it would be attended to or not, must, out of a state of society, depend upon the transgressor himself, for there would not in such a state be any existing authority to decide upon or to enforce the right of the sufferer, and both the one and the other would, therefore, necessarily be the sole judge in his own cause. But in society the case is different, upon the admission of the gentleman himself; for there his claims are 'referred to be decided by the arbitration of the public tribunals, and his wrongs to be redressed by the public arm.'

It is said, however, by the author of the 'Remarks,' that 'When, amid the strife of civil dealing, the magistrate and the laws interfere in aid of the party soliciting redress, here is obviously no right abandoned; it is, on the contrary, expressly recognized; it is *the mode of obtaining it*, only, that is changed.* But it appears to us most obvious, that the right of judging for one's self, which is the right in question, is abandoned; for first the party against whom redress is sought was in an uncivilized state independent of the controul of the magistrate and the laws. It rested with himself to give redress or not; but in society he is *compellable* to make satisfaction, and, therefore, his natural right is abandoned. And secondly, with respect to the party who solicits redress, whether it was an injury or not, or whether he was entitled to redress or not, and if so—the magnitude of the injury received, and the measure of redress to which he was entitled—were, in an uncivilized condition, matters for his own decision: but in society it is to be determined by the authorities which it has constituted for the purpose, and consequently the right which *he* possessed in an uncivilized state is also abandoned.

Mr. Sedgwick proceeds to observe,† that—'The phrase "surrender in trust," as used by Mr. Burke, has too much of ambiguity. Our liberties must either be renounced or retained; there is no medium. As natural

* Rem. p. 90.

† Ibid.

' liberty consists in the absence of all constraint on all
 ' our actions, in their tendency neither mischievous nor
 ' immoral, if we have surrendered this liberty, we must
 ' have admitted the exercise of this constraint to the full,
 ' and obliged ourselves to conform, in all respects, to the
 ' will of the power to whom such surrender is made.'

But is Mr. Sedgwick prepared to contend that there may not be such a thing as a conditional surrender, which will place the surrenderee in the situation of a fiduciary? Is it not the great end of society to secure to individuals the enjoyment of as much liberty as is consistent with the general good? In order to insure to one the enjoyment of that liberty, it is necessary that the natural rights of every other individual should be restrained by society so far as it may be required for the attainment of that purpose. It is only to promote that end that man surrenders his natural rights at all, and consequently there arises on the part of society, an obligation not to restrain any individual from doing those things which, in virtue of his natural rights, he might in an uncivilized state have done, further than it is necessary that other individuals should be restrained in like manner, in order to secure to him the undisturbed exercise of *his* liberty in other respects. Such a surrender may therefore be well called a "surrender in trust." It is the property of individuals placed under the guardianship of society, and is no more 'renounced' than any other property which may be confided to the care of a trustee with permission to apply at his discretion such a portion of it as may be required for the security and preservation of the remainder to the rightful owner. By such a surrender in trust there arises on the part of society, the surrenderee, an obligation so to manage the property entrusted, as to secure to the surrenderor the enjoyment of the greatest proportion of it possible, and consequently the latter does not oblige himself to submit to an *unlimited* constraint on all his actions and to conform in *all* respects to the *will* of that power to whom such surrender is made.

Having already gone so much at length into the subject, it cannot be necessary to add any further observations with the view of combating Mr. Sedgwick's conclusion that—'The real natural rights and liberties of mankind

‘ exist in all their perfection and validity under every or
 ‘ ganization of political power.*

Reverting to Sir W. Blackstone’s proposition, that
 “ every man, when he enters into society, gives up a part
 “ of his natural rights as the price of so valuable a pur-
 “ chase,”† Mr. Sedgwick proceeds to examine it more
 in detail, and we shall follow him in that examination,
 although some of our future observations will be little
 more than brief repetitions of what hath been already
 advanced upon the general argument. He informs us,
 in the first place, that ‘ the question, *what are the natural*
 ‘ *rights of man, and wherein do they consist?* is certainly of
 ‘ extreme importance, though by no means so difficult of
 ‘ solution as the vehemence with which it has been agi-
 ‘ tated, and the controversies to which it has given birth,
 ‘ might lead us to imagine ;’ and he then proceeds to fa-
 vour us with an enumeration and a definition of what he
 conceives to constitute our natural rights. ‘ The primary
 ‘ and most estimable of those rights consists, (he says,) in
 ‘ the unmolested enjoyment of his personal freedom, so
 ‘ long as he refrains from disturbing the possession of the
 ‘ same right in others. But here arises an essential con-
 ‘ sideration, which we ought ever to hold in mind, which
 ‘ is, that he is morally bound to exert his powers and fa-
 ‘ culties, as well mental as corporeal, for the common
 ‘ benefit, and so to exercise them for his private service
 ‘ as to detract nothing from the general good.‡ This
 doctrine is at least new : if it be correct, the natural right
 of A. ceases when A. molests B. in the enjoyment of his
 right ; for A.’s right is to continue *so long only* as he re-
 frains from disturbing the possession of the same right in
 others. Again, as A.’s right to the unmolested enjoyment of
 his personal freedom ceases after his having disturbed an-
 other, he cannot, according to this doctrine, have any right
 to protect himself against, but must be passive under, that
 behaviour towards him from others which before the for-
 feiture of his freedom he might have resented and oppos-
 ed. But the fact is, that in an *uncivilized* condition, A.’s
 right to personal freedom continues, although he may
 have exercised it wrongfully by disturbing the possession
 of such a right in another. According to Mr. Sedgwick
 himself, even B. the individual actually aggrieved, would

* Rem. p. 90. † Com. v. 1, p. 125. ‡ Rem. p. 91.

have no right to retaliate upon A. and then clearly, by a much stronger reason, no other person could acquire a right to molest A. in the future exercise of his rights merely because that he had violated the right of B.—‘To retaliate the injuries we may receive,’ says that gentleman, ‘as it is the reverse of our duty, cannot be our right.’* The enjoyment of his personal freedom, is, in an uncivilized state, the right of every individual. The observance of this right in others is his duty, but the non-observance of his duty is not the forfeiture of his right.† There is nothing to prevent him from exercising it in the absence of the restraint which is imposed by the civil power.

With respect to the moral obligation which is said to arise of exerting his ‘powers and faculties, as well mental as corporeal, for the *common benefit*, and so to exercise them for his private service as to detract nothing from the *general good*’—what obligation, it is asked, could man be under, living in an uncivilized state—a condition in which he is not civilly connected with others—to exert his powers for the common benefit? what regard could he be supposed to have for the public good?—The *common benefit* and the *public good* would be terms not understood by men living in an uncivilized condition, because it is the benefit and welfare of the general united body that is denominated the common benefit and the public good. Surely, with respect to the exercise of his right—in an uncivilized condition, man can be under no other restraint, than is implied in the maxim, *sic uteretur ut alienum non laedas*. Nay, in a state of society even, it is not expected of him to exert his powers and faculties for the common benefit.

The next natural right, according to Mr. Sedgwick, is the right of property.‡ But it is not easily perceivable how individuals could have by nature an exclusive right to property. That the earth and all things which it contains were the gift of God to mankind,§ cannot be disputed, from which it follows most unquestionably, that all men by nature acquire a *general* property in them. Then,

* Rem. p. 89.
p. 81.

† See further *infra*, p. 95, and *supra*,
‡ Rem. p. 91.

§ Genesis, i. 28.

as all men have a general property in the whole, it is obvious that individuals cannot have *an exclusive* property in any particular part of that whole. The first possessor indeed acquired a temporary and transient property in that of which he was in the possession; still, however, he had no right to the substance itself, but merely to the enjoyment of it, so long as he continued that possession. When he abandoned the possession it was again open to the first comer, who also in like manner acquired the same sort of temporary ownership.* However, as to that absolute or permanent right of property which men enjoy in society, and which is, it is presumed, the kind of property of which Mr. Sedgwick speaks from his asking 'if any portion of this absolute right is relinquished,'† it is utterly impossible that in the natural state it could have any existence. Wherever the right is admitted, the laws are referred to as its origin.

But it is said‡ that—'The depositary of this property is bound to employ it in augmentation of the sum of *social* comfort, in meliorating the condition and ministering to the exigencies of his fellow beings!' Now admitting for a moment the existence of a natural right to property, what possible obligation can a man be under to minister to the exigencies of others living in a state of disunion with him? How, out of society, can he be called upon to augment the sum of *social* comfort? How can social comfort possibly exist where there is *no society*? Many of the remarks which were made upon the first law in Mr. Sedgwick's new code apply with equal force here. The gentleman goes on to ask,‡ 'Is any portion of this absolute right relinquished? Must man, in political community, submit to an abridgment of it?' We have already contended that there never existed any such natural absolute right, of course therefore it cannot, as a natural right, be either relinquished or abridged upon entering into society—Society is the parent of this absolute right.

Another of the most valuable of our natural rights, and which ought never to slacken in our grasp, is, (says Mr. Sedgwick,||) that of exerting at all times and without re-

* Com. 2, v. p. 3, and references.

† Ibid.

|| Ibid.

† Rem. p. 92.

'striction those attributes of mind with which we are endowed in the investigation and development of truth, and to proclaim the result of our researches whenever they may conduce to the general benefit, let the errors exposed inhere in whatever or whomever they may.'—That man has a natural right to the exertion of his mental faculties, as well as that that right does, nay must, continue in a state of society, is admitted. To pass a law to prevent man from exercising his mind, would indeed be a novelty in modern legislation! The remaining points of the proposition cannot, however, be so readily acceded to. First, there is the same mystery here as in Mr. Sedgwick's observations upon the two supposed preceding rights, for how is man to proclaim the result of his researches, or how can the exercise of such a right conduce to the *general* benefit when individuals are living in that detached and uncivilized condition in which no general benefit can exist? And secondly, with respect to the promulgation of the result of our researches, it cannot be at all times, and in all cases admissible in a state of society, for those researches might have given rise to doctrines which the person entertaining them might consider true and just, and likely to be attended with beneficial effects; but the which might notwithstanding, in the opinion of wiser men, be fallacious and unsound, and the circulation of them amongst the people, in particular junctures at least, likely to produce the most pernicious consequences. It would be the duty of the government in such a case to restrain any individual from proclaiming the result of his researches. The good of society and consequent welfare of individuals would require such restraint; and his natural right in that event *ought* to 'slacken in his grasp.'

'The next in order of our natural rights' (continues Mr. Sedgwick)* (and the last that is worth any distinct mention, since every other may be included in those already enumerated,) is the right which we are said to have wholly yielded up, of repelling force by force. In addition to what has been just remarked on this head, it may be observed, that *the right of self defence*, in cir-

* Rem. p. 92.

' circumstances where the law would come too late for our assistance, is still possessed.' Now it is admitted that this natural right is still in part possessed, but the exercise of it, as Mr. Sedgwick concedes, is in part restrained; for it is still possessed only, *in circumstances where the law would come too late for our assistance*. And that being so, it clearly cannot furnish an argument against Sir Wm. Blackstone's position, that upon entering into society man gives up a *part* of his natural rights. If the observations respecting this right are meant to be applied in opposition to the doctrine of Mr. Burke above noticed, then the question would be how they are possessed as to the part which remains? Is it by virtue of a natural right, or by the permission of society?

But the gentleman is mistaken in attributing to Mr. Burke such an assertion as that of our having *wholly yielded up* the rights of repelling force by force, for it is only said that he "inclusively in a great measure, abandons his "right of self-defence;" and when the signification of the passages in Mr. Burke's book is well understood, the remarks of Mr. Sedgwick, if they affect his doctrine at all, instead of disproving, add confirmation to it; for the former says that the right is in a *great measure* abandoned, and the latter that it is 'still possessed in circumstances 'where the law would come too late for our assistance'—circumstances which do not often happen; and consequently both agree that it is only retained in part.

The author of the 'Remarks,' however, contended in a former page* that '*whatever* a man might do in an uncivilized state in the exercise of his absolute natural right, he may do in like manner in society;' and here he admits that the particular right under consideration cannot be *fully* exercised; that is, 'in those cases where the law would not come too late for our assistance; and that each individual is *made* to seek in the national authority that redress which he could not confidently look for in his own wisdom.' But it is plain that if society has *made him seek* for redress in the national authority, then it has prevented him from obtaining redress by the exertion of his own powers, and his natural right is abridged.

* Rem. p. 88.

The gentleman proceeds to observe,* that ‘ Although the right to life, and liberty, and property, are denominated *natural* rights, as distinguished from those which arise out of the reciprocal dependence and relation of man in politic society, they are yet improperly affirmed to be *equal, absolute, and indefeasible*; they are, and necessarily must be, respective and conditionate. The application of them to the purposes for which they were bestowed is the feudal tenure, under which they are held.’ We now perceive upon what ground the opinion which Mr. Sedgwick hath advanced in a former page rests,† viz. that man has right of personal freedom, *so long* as he refrains from disturbing others in the possession of the same right; the signification of which is, that the right ceases when it is attempted to be exercised to the injury of another. But what reason is there to believe that the right to personal freedom, or any other of our natural rights, is held upon any such condition? The gentleman himself, whatever his private opinion of the matter may be, evidently does not assign any when he says,‡ that ‘ Were they absolute and not conditionate, the punishment of death and imprisonment, of fine and outlawry, ought, in justice, to be confined to such crimes alone as the code of natural laws expressly interdict, such as robbery, homicide, and such like;’ for if the legislature should decree the punishments of death or imprisonment, for example, for offences purely political, it would not follow that life and the enjoyment of personal freedom were not absolute rights, although the consideration as to whether they are absolute rights or not might be proper when examining whether such punishment ought to be inflicted for offences of that description. That remark would be nearer the truth by being *reversed*, for clearly no crimes could be punished upon the ground that our rights were conditionate except those crimes which are included in the conditions upon which the rights are established, that is to say, ‘ such crimes alone as the code of natural laws expressly interdict’—but supposing those rights to be by nature absolute, it is not inconsistent with justice to extend those punishments to crimes which are not the object of any natural law, because society acquires the right to inflict them

* Rem. p. 93.
p. 81 and 90.

† Vide Rem. p. 88 and 91, and supra,
‡ Rem. p. 93.

in the case of every individual who becomes one of its members, inasmuch as every such individual submits himself to be governed by the laws which have been passed for the regulation of that society.

With the view of showing that the natural rights of man are not conditionate, but absolute, it is to be observed, in addition to what hath been already advanced,* that if they had been only conditionally bestowed, the exercise of them after a breach of the condition would in some way or other be impossible or restrained. That all powerful Being who bestowed the right, had he intended it as a conditionate right only, would have caused the future enjoyment of it to cease as soon as it should be misapplied or abused, as a necessary and inevitable consequence of his offence; but it is in a future state that sinners are to be punished by their Creator, and not in the present. The murderer, for example, does not lose his life, or personal freedom, if he can escape the vengeance of the civil power, which shows that those rights were absolute and not conditionate, as they proceeded from the giver; as well as that when offending individuals are bereft of the future enjoyment of their natural rights, that consequence results from the intervention of the civil power under the sanction of the laws of society, and not from any such cause as that those rights were in the first place only conditionally bestowed. Having endeavoured to prove that the duration of our natural rights is not limited by him from whom they are derived to the period of our making a rightful application of them, it only remains to be considered whether in an uncivilized state,—a state in which our natural rights are fully possessed,—they would suffer any deprivation, or diminution, in case of our being guilty of violating the rights of others. Now, before mankind become united in society, there would be no combination of individuals, to secure by their collective strength, their several rights, and to redress their several wrongs. Individual would be opposed to individual. Suppose one man to murder another; would a third, a stranger to both, to whose knowledge the crime might come, attempt to deprive the murderer of his life, or of the future exercise of his personal freedom? It was not an offence against

* *Supra*, p. 81 and 90.

him, but a sin towards God, the giver of that life which has been unjustifiably taken away. Would he hazard his own life in the punishment of one by whom he had not been injured? Is it probable? Would it not in many cases, be impossible? Those who would deprive others of their rights, would in general be the individuals who would have reason to place dependence upon their personal strength. The strong man; then, would mock the attempt of any weaker individual to deprive him of the future exercise of those rights which nature bestowed upon him at his birth. When, in a state of society, any individual suffers death or imprisonment in consequence of his having violated the rights of life, or personal freedom in another, it is not upon the ground that his own natural right to life or liberty was affected or altered by the offence itself of which he had been guilty; not because his right was conditionate; but the reason why he undergoes either of those punishments, is, that they have been decreed by the laws of society for a breach of that duty which forbids him to break in upon the rights of others, and the observance of which is indispensably necessary to the security and peace of every member of the community. With respect to the questions with which the gentleman concludes this branch of the subject, it will be sufficient to remark, in addition to what hath been already advanced, that, whether they were absolute or conditionate originally, they, at all events, are, in a state of society, placed under the restriction and control of the laws.

Mr. Sedgwick in the next place asserts,* that—"We might be led by the language of the learned commentator to imagine that *natural liberty* consisted in a mutual right to pillage, defraud, harass, and circumvent each other." The language alluded to is the following: "This species of legal obedience and conformity" (viz. obedience and conformity to the laws of society) "is infinitely more desirable than that wild and savage liberty which is *sacrificed* to obtain it. For no man that considers a moment, would wish to *retain* the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would

* Rem. p. 94.

"also have the same power ; and then there would be no
 "security to individuals in any of the enjoyments of life
 "Political, therefore, or civil liberty, which is that of a
 "member of society, is no other than natural liberty so
 "far restrained by human laws (and no farther) as is
 "necessary and expedient for the general advantage of
 "the public. Hence," he adds, "we may collect that
 "the law which restrains a man from doing mischief to
 "his fellow-citizens, though it diminishes the natural,
 "increases the civil liberty of mankind."* The author
 of the 'Remarks' then endeavours to substantiate his asser-
 tion by the following reasoning: 'As every *sacrifice* im-
 'plies a *previous enjoyment* of the thing resigned, and as
 'what might have been *retained* must have been *possessed*,
 'it may be inquired, from whence is this *natural liberty*
 'communicated to us, which we thus gratuitously devote,
 'and which it would be so impolitic and injurious to re-
 'serve? Our author has just now told us, that it is in-
 'herent in us by birth, and was *one of the gifts of God* to
 'man at his creation. Is it, then, in the benevolent ten-
 'dency of the schemes of Providence to introduce or up-
 'hold the empire of perfidy, fraud, and violence amongst
 'men?' Now nothing of the kind can be inferred from
 the observations of Sir W. Blackstone; for he expressly
 says, only ten lines above, in the very same page, that
 "natural liberty consists properly in a power of acting
 "as one thinks fit, without any restraint or control,
 "*unless by the law of nature*;"† and then as the law of
 nature is the will of God, and contains the precepts of
 morality, it must necessarily shut the door against per-
 fidy, fraud, and violence. It is true, that the learned
 commentator has observed that the law which restrains a
 man from doing mischief to others diminishes his natural
 liberty, and therefore, say his opponents, in the exercise
 of his natural liberty he might do mischief. But they do
 not seem to consider, that being endued with the faculty
 of free will, he has the liberty of acting as his will may
 direct. It is by the laws and powers of society only that
 he is restrained from acting, or that he is punished in
 this life for acting, so as to abuse the powers with which
 he is gifted. Out of society, those laws and powers are

* Com. v. I, p. 125, 126.

† Ibid. p. 125.

wanting, and he has the unrestrained liberty of doing mischief; certainly, however, not without incurring his Creator's displeasure, but still he has the power if he is rash enough to exercise it. But if we are not constrained to admit that it follows from Sir W. Blackstone's remarks, that it is in the benevolent tendency of the scheme of Providence to uphold the empire of fraud, &c.—Mr. Sedgwick seems to think that we must allow as the only alternative, that 'it cannot be truly said, that the law which restrains a man from doing mischief to his fellow-citizens diminishes his natural liberty'* As, however, that natural liberty is the *power* of acting according to the directions of his own free will, even if it should be mischievously towards others as before observed; and as the object and tendency of the laws of society is to restrain him from acting in that manner, it may truly be said that those laws which restrain him from doing mischief, do diminish his natural liberty.

'The author of nature,' continues Mr. Sedgwick,† 'could at no time have bestowed on us the freedom of acting in any mode subversive of that satisfaction and felicity which it was his benignant design should be shared by and secured to all.' If by the words *freedom of acting* is meant *acting with the approbation of the Creator*, it is allowed that no freedom of acting in any mode subversive of the happiness of others was bestowed upon man. But if by the freedom of acting he means the *power of acting*, then it has been already contended that man has the power of acting to the prejudice of others.

'The gentleman remarks that—'Every act having such a tendency, must be considered as abusive of the gift of free will, and of that liberty which for far other purposes was conceded to us.' This remark is just, but then it admits all that we are contending for, that man has the free will and the liberty to act to the detriment of others, if he dares so to abuse that free will and that liberty.

It is said also that—* 'If we could (would) ascertain the active reach and real origin of our natural rights, we must previously ascertain the nature and extent of our natural duties;' and that—'Man brings no-

* Rem. p. 94.

† Ibid. p. 95.

‡ Ib. p. 95, 96.

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‘ thing with him into society but his duties ;’ that ‘ these are supreme and pre-existent ;’ that ‘ they govern his rights and are not governed by them.’ But it is not to be perceived how any such connexion exists between the rights and the duties of the same individual. Whence arises the duty of A. towards B. but from the circumstance that B. has a right to that which A.’s duty binds him to the observance of. The duty of A. not to molest B. in the peaceable enjoyment of his possessions would not exist unless the things possessed were the right of B. So in like manner the duty of B. arises from the existence of the right in A. The gentleman’s doctrine therefore is unsound, for the right must be ascertained before the corresponding duty can be defined or known, and—man must necessarily bring with him his rights as well as his duties, for if B. had no right, A. could not possibly have any duty to observe towards him in respect of it.*

Speaking of the rights of the people of England Sir W. Blackstone observes that—“ The absolute rights of every Englishman, (which taken in a political and extensive sense, are usually styled their liberties), as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human.”* Upon this passage Mr. Sedgwick remarks† that—‘ Our *absolute*, as contradistinguished from our *political* rights, can neither be fluctuant nor subject to variation; nor if founded on nature, can they truly be said, at the same time to be of human establishment.’ But it is to be observed, that by the expression, *absolute rights*, the learned commentator did not mean our absolute as contradistinguished from our political rights, as Mr. Sedgwick would have us believe. This is manifest from every part of the sentence itself; for, first, the rights spoken of are the rights of *Englishmen*, that is to say, the rights which we possess as subjects of the kingdom of England, and it is therefore impossible to suppose that our absolute rights as men could have been intended as distinguished from our political rights as *English* men. Secondly, those rights are said to be coeval with our form of government, whereas the absolute rights of

* See further *infra*, p. 103. † Com. p. 127. ‡ Rem. 96.

Englishmen, as contradistinguished from our political rights, must have existed previously. Thirdly, they are declared to be of human establishment, which our absolute, as contradistinguished from our political rights, are not. The first part of the objection which has been raised by the author of the Remarks consequently falls to the ground, and serves only to evince that he did not perceive the true signification of the position, the accuracy of which he attempts to dispute.

With respect to the remark, that if founded on nature they cannot be truly said at the same time to be of human establishment, it is clear that human establishments may have nature for their basis, and that civil laws may be founded on the natural law; and by the expression the learned commentator must have meant that nature and reason constitute the foundation upon which those rights rest. Mr. Sedgwick observes also—‘Our author besides has already averred these absolute rights to be vested in man *by the IMMUTABLE laws of nature*; if so, it follows that they must be fixed and unfluctuating as the laws which put us in possession of them.’ But where the last mentioned expression occurs, Sir W. Blackstone was speaking of our absolute rights as men;* whereas he here treats of our civil rights as Englishmen as hath been just now proved. The former are vested in us by the immutable laws of nature, but the latter being under the regulation of the laws of society are subject at times to fluctuate and change, inasmuch as the laws themselves are liable to occasional variations.

The learned commentator reduces the rights of Englishmen to three principal or primary articles, viz. “The right of personal security, the right of personal liberty, and the right of private property;” and observes, that they “were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world, being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England.”† After having asserted that, ‘all right is, in its genuine and legitimate signification, a title founded in equity,’ the author of the ‘Remarks’ contends,‡ that

* See above p. 78, 79 and Com. v. 1. p. 124. † Com. v. 1, p. 129.

‡ Rem. p. 97.

‘the *rights themselves*, (of all mankind) can never be cancelled but by the crimes of the individual possessor;’ but he at the same time concedes, that ‘the enjoyment of the *objects of right* may indeed be suppressed.’ Now, the word *rights*, may be correctly used to signify the privileges themselves or objects of right; and is so used in innumerable instances in our language. That the word *right*, is made use of by Sir W. Blackstone to express the object of right, and not the equitable title to that object, is manifest beyond dispute; from his saying that the rights in question ‘*consist of a number of private immunities; which will appear, to be indeed no other, than either that residuum of natural liberty, or else those civil privileges, which society hath engaged to provide in lieu of the natural liberties which have been given up.*’* It is indisputable then that Sir W. Blackstone means, under the term *rights*, to speak of that residuum and those immunities and privileges, that is to say, the very things or objects themselves, and not the equitable title to them, and that being so, the learned commentator’s observations are upon the strength of Mr. Sedgwick’s own admission strictly correct.

‘Great care should be taken,’ says Mr. Sedgwick, ‘to discriminate the object which our right respects from the *right itself*.’ The learned commentator has not sufficiently attended to this distinction when he informs us, that ‘Life is the immediate gift of God, a *right* inherent by nature in every individual. Here the right,’ continues the gentleman (which we have just now defined to be a *title* founded in equity) ‘is confounded with *the subject* to which that right attaches; things as separable in their nature as a legal claim to a paternal estate from the estate itself.’† Now the first remark to be made is, that this passage forms an additional proof that by the word *right* the learned commentator meant the thing itself—or object of right. There is no such confusion as Mr. Sedgwick would have us believe between the title and the subject, for the whole context proves that it is alone the subject which is spoken of—The word right has various significations. It is sometimes used to express a just claim or title to a thing, sometimes the thing or property itself. In other

* Com. v. 1, p. 129.

† Rem. p. 98.

places it is employed as a convertible term for an immunity or privilege. Then, where we meet with such words, (and they abound in the English language) how are we to affix to them the true sense which they were intended to bear but by attending to the context, and here the context furnishes unquestionable evidence that the word does not signify a title to the subject, but the subject itself. The gentleman observes that *he* has just now defined it to be a title founded in equity, but unfortunately he has omitted to favour us with a very material piece of information which cannot but be considered as necessary to have accompanied that observation—I allude to his not having made us acquainted under what kind of obligation we are to accept his definition, in preference to the definition of our best writers and principal lexicographers.

‘If moreover,’ continues Mr. Sedgwick,* ‘the right to life be, as unquestionably it is, the gift of the Creator, it is manifestly a *derived* right, and cannot properly be termed *inherent*.’ But it is evident that *life*, which is what the learned commentator speaks of, may with strict accuracy be said to be by nature inherent in the individual who derives his being from the Creator.

‘It is the preponderant duty of every man,’ it is also said,† ‘to refrain from offering violence to his fellow beings; hence,’ he adds, ‘arises our natural right to life, and to the uninterrupted enjoyment of our faculties. That such is our duty is admitted, but it is denied that it is the parent of our natural right to life, for it is conceived that the duty must result from the right and not the right from the duty. Whence proceeds his right to the house which any individual may have purchased? Is it because it is the duty of all others not to disturb him in the possession of it? Certainly not; but because having purchased it, he has thereby gained an exclusive right to it. The duty of others not to disturb him in the enjoyment of it results from its being his. So it may be said that my right to life arises from its being the gift of God, and the duty of others not to molest me in the enjoyment of it results from its being my right.’

The following observations of Sir W. Blackstone are

* Rem. p. 98.

† Ibid.

pronounced by Mr. Sedgwick to be by no means true. "The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply for all the necessities of life, from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor."* With the view of exposing the unsoundness of these observations, the author of the 'Remarks' offers arguments to show that—"The active and industrious members of society, are not bound to support the slothful indigent or to relieve the wilful wretched."† But the learned commentator does not mean that such worthless characters are entitled to support under our law. He alludes to those who may obtain relief under the statutes respecting the poor, as appears from his referring to those statutes. Now those statutes ordain relief for the impotent, and work for the vigorous and idle poor; and therefore his observation cannot by any fair interpretation be held to import, that the law supplies the slothful poor with every thing necessary for their support.

It is also observed,‡ that the rights of those who are incapacitated for labour, 'cannot be numbered among our natural rights.' To be sure they cannot, nor does Sir W. Blackstone say that they may, for he is not speaking of our natural right; the passage is part of a digression to shew how highly the *law of England* regards life and member.

"The rights of life and member," says Sir Wm. Blackstone,¶ "can only be determined by the death of the person, which was formerly accounted to be either a civil or natural death. The civil death commences, if any man be banished the realm by the process of the common law, or enters into religion, that is, enters into a monastery, and becomes there a monk professed." This passage will, it is said, 'convince us of the loose and desultory sense in which the term "right" is employed. 'The rights of life and member,' says Mr. Sedgwick, 'are in the one case identified with the immunities and

* Com. v. 1, p. 131.

† Rem. p. 92.

‡ Ibid.

¶ Com. v. 1. p. 132.

'*privileges of civil union, and in the other, with life itself.*'* But is the fact so? The expression is, that they can only be determined by the death of the person, and consequently they are identified with life itself, or with what is so regarded by the law. In the one case, when the man is actually dead, the rights necessarily cease. In the other cases, the law considers them to have ceased, because *in its contemplation* the man is absolutely dead, although the fact is otherwise; and Sir Wm. Blackstone is examining how *the law regards life* and member. But what does Mr. Sedgwick wish us to understand that he means by *immunities* and *privileges*? The monk enjoyed no immunity by his being considered *civiliter mortuus*, for he was so accounted, because he was *not* suffered to enjoy the benefits of society, having secluded himself from it, and refused to submit to its regulations:† and surely no man could consider it an immunity and privilege to be banished the realm! 'If it be true,' continues Mr. Sedgwick,‡ 'that these rights are determined, as to the description of persons above mentioned, must we not admit that they may at any time be maimed or murdered without scruple, and without crime?'—The concession sought for may be successfully resisted, for the above expressions of the learned commentator do not imply that *all* their rights are annihilated.—The rights under consideration are not the rights of men, but of *Englishmen*, as secured to us by the laws of England. When an individual withdrew or was driven from the society in which it is our happiness to live, the laws which regulated that society considered his rights, as *one of its members*, extinct. Such banishment or seclusion amounted to a civil death: and the law acknowledged the existence of no such person, as entitled to the benefit of that society, which the law of England governs. But although it may be collected from the learned commentator's observations that they were not afterwards entitled to the benefits of society, yet it does not follow that they might be injured or murdered without crime; because although they had forfeited their civil rights as Englishmen, they still possessed their natural rights to life and member as men,—rights which it was equally incumbent upon other individuals to respect after that banishment

* Rem. p. 100. † Com. v. 1, p. 132. ‡ Rem. p. 100.
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or seclusion, as it was before the institution of society itself.

"The third *absolute right inherent* in every Englishman "is," says Sir Wm. Blackstone,* "that of *property*; which "consists in the free use, enjoyment, and disposal of all "his acquisitions, without any control or diminution save "only by the laws of the land." Upon which Mr. Sedgwick remarks,† that 'the right of property is adjusted and 'encircled by our moral obligation;' and that the laws of the land are not the *only* control 'on the exercise of our 'rights, to which it behoves us to attend.' This is true enough; but it does not call in question the accuracy of the learned commentator, for he is only speaking of the rights which we enjoy *under the laws of England*, and as circumscribed by those laws merely, whereas Mr. Sedgwick's observation relates to the moral duties of men, and to their responsibility to their Creator, for a just exercise of what that gentleman conceives to be one of their natural rights.

It is said also‡ that—'*A natural and inherent right can 'suffer no reduction.*' Sir Wm. Blackstone, however, is not speaking of our natural rights, or those rights which are inherent in us by birth, but of our political rights as Englishmen, as hath been already observed.¶ Mr. Sedgwick also remarks,§ 'to say that this inherent right of property admits 'no control or diminution, SAVE ONLY BY THE LAWS OF 'THE LAND, is to give a latitude of interposition which by 'no means limits its enjoyment to *Englishmen* alone.' But the learned commentator does not contend, that the enjoyment of the right of property is limited to Englishmen alone. He asserts indeed that it is enjoyed by the people of England in a superior degree; and surely, the extent in which it is incapable of being enjoyed, or the control or diminution to which it is subject, must vary in proportion as the laws or constitution of one country differ from those of another: and as the laws of England are enacted in a less arbitrary manner than are the laws of other countries, so the rights of the people of England are in less danger of being controlled or diminished.

The following observations in the Commentaries are by

* Com. v. 1, p. 138.

† Rem. p. 101. ‡ Ibid.

¶ Supra, p. 80.

§ Rem. p. 101.

Mr. Sedgwick deemed to be contradictory and inaccurate. "So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this *without consent of the owner* of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and *compel the individual to acquiesce*. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent *for the injury thereby sustained*. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is *to oblige the owner to alienate his possessions* for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform."* Now although it is said in one part, that the law permits no man, or set of men, to do it without the consent of the owner of the land: and, in another part, that the legislature can and frequently does interpose, and compel the individual to acquiesce; yet is there not any contradiction, because the legislature is not included under the terms *man or set of men*, for by these terms, Sir W. Blackstone meant to speak of public tribunals and private individuals only. The sum of the whole is, that nothing but the legislature can compel; Mr. Sedgwick says—'That the good of the individual ought to yield to that of the community, is a truth which never ought to be urged in vain.'† Now Sir

* Com. v. 1, p. 130.

† Rem. p. 104.

W. Blackstone has not asserted the contrary, for the signification of the observations in the Commentaries now under consideration, is, that *the legislature alone* is competent to decide upon the expediency of such a proceeding in every particular instance, and that no private man or public tribunal, are or ought to be invested with any such power, and it is upon that principle that the legislature acts when it does compel.

With respect to the highway act, of the 13th Geo. III. c. 78, which certainly does, as Mr. Christian has observed, empower two justices, (a set of men,) to divert any highway through any person's soil, it was passed since the learned commentator wrote, and therefore cannot be advanced in proof of his inaccuracy.

"Nor is this the only instance," continues Sir W. Blackstone,* "in which the law of the land has postponed even public necessity, to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes even for the defence of the realm or the support of government, but such as are imposed by its own consent or that of his representatives in parliament." This theoretic doctrine, observes Mr. Sedgwick,† is not only glaringly refuted by facts; but is itself radically objectionable. Taxes cannot in reason and plain sense be considered as the *free will offering* of those upon whom they are levied. They are imposed by public authority, and are wholly distinct in their nature from voluntary contributions. But it is to be observed that Sir W. Blackstone refers to several acts of parliament to show, what the law of England in this respect is, as 25 Edw. I. c. 5 and 6, which enacts that "the king shall not take any aids or tasks but by the *common assent* of the realm;" and alludes also to its having been made an article in the petition of right, 3 Car. I. that no man shall be compelled "to yield any gift, loan, or benevolence, tax, or such like charge, without *common consent*, by act of parliament." It is true, therefore, that the people of England cannot be constrained to pay any taxes, but such as are imposed by the consent of the people of England.

The learned commentator is not to be understood as

* Com. v. 1. p. 140.

† Rem. p. 104, 105.

meaning that taxes are the *free will offerings*, the *voluntary contributions* of the individuals upon whom they are levied, for he adds "or the consent of his representatives in parliament," whereas to every such offering or contribution it is essential that the assent of the *very individual himself* be actually signified.

With the design of proving the incorrectness of Sir W. Blackstone, Mr. Sedgwick observes, that*—'Taxes are a commutation for *personal service*,' and then asks, 'Shall we, then, affirm of those who by *press warrants* are enlisted in the service of their country, that the tax thus discharged in its original and primitive form is spontaneous and self imposed?' Upon which it is deemed quite sufficient to observe, that although taxes are in the main a commutation for personal service, yet personal service is not necessarily in itself a tax. How a man who is reluctantly taken from his family by a press warrant can be said thereby to discharge a tax, is a problem too difficult to be solved by any mind which possesses only common powers. If it can be shown to be a tax, we would beg to be informed also, what other form it bears in addition to this, its original and primitive one, as well as the particular commutation, which may be substituted for it by the persons liable to be pressed? It would be also a desirable thing to know,—as the being pressed is said to be the discharge of a tax, and as taxes are also said to be a commutation for personal service,—*whose* service it is, that is commuted for in this way, when the liability to be impressed arises solely from the persons previous occupation in life? Should Mr. Sedgwick attempt to get over these difficulties, we would further beg leave to intimate that all taxes are imposed by the legislature, but that press warrants are issued under the powers, and by the authority of the executive only.† Whether the right of private liberty is treated with due respect, where pressing is had recourse to, it is inconsistent with my purpose to inquire.

"The restrictions," (says Sir W. Blackstone,‡) "for some there are, which are laid upon petitioning in England, while they promote the spirit of peace, are no check upon that of liberty. Care only must be taken, lest under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened on

* Rem. p. 105. † See Bl. Com. v. i. p. 419. ‡ Ibid. p. 143.

“ the opening of the memorable parliament in 1640; and
 “ to prevent this, it is provided by the statute 13 Car. II.
 “ st. 1, c. 5, that no petition to the king or either house
 “ of parliament for any alteration in church or state, shall
 “ be signed by above twenty persons, unless the matter
 “ thereof be approved by three justices of the peace, or
 “ the major part of the grand jury in the country; and
 “ in London by the lord mayor, aldermen, and common
 “ council; nor shall any petition be presented by more
 “ than ten persons at a time. But under these regula-
 “ tions it is declared by the statute 1 W. and M. st. 2,
 “ c. 2, that the subject hath a right to petition; and that
 “ all commitments and prosecutions for such petitioning
 “ are illegal.” In opposition to this doctrine of the learn-
 ed commentator, Mr. Sedgwick, in a note, cites part of a
 speech of Mr. Dunning,* to the effect, that—‘ the act
 ‘ which was passed in the reign of Charles the Second,
 ‘ (the act above mentioned,) prohibiting under certain
 ‘ penalties, any petition to be presented to the king, or
 ‘ either house of parliament, if signed by more than
 ‘ twenty persons, was *completely repealed* by an article in
 ‘ the bill of rights which *was meant* to restore to the peo-
 ‘ ple that great *privilege* which the act of Charles was
 ‘ calculated to abridge, if not to take away;’ and that ‘ to
 ‘ argue that the act of Charles was now in force would be
 ‘ as puerile and absurd as to pretend that the prerogative
 ‘ of the crown still remained in its full extent, notwith-
 ‘ standing the declaration in the bill of rights.’ Now it
 seems not a little extraordinary, that the author of the
 Remarks should have quoted Mr. Dunning’s speech as an
 authority upon this subject, and not have taken any no-
 tice at all of a much higher authority; which is the joint
 and clear opinion of the whole court of King’s Bench in
 Lord George Gordon’s case, in which similar arguments
 to those of Mr. Dunning had been urged by the counsel
 for the prisoner; and in which also Mr. Dunning himself
 was one of the counsel for the crown; and there Lord
 Mansfield in his directions to the jury, said, that he had
 never before heard it supposed that the act of Charles the
 Second was repealed, and that it was the *joint and clear*
opinion of the whole court, that the bill of rights did not
mean to meddle with it at all; that neither THAT nor any
other act of parliament had repealed it; and that it was

* See Rem. p. 107; and New An. Register, 1781, v. 2.

*in full force.** If therefore authority is to have any weight in the consideration of the question, we have, on the one hand, the joint and clear opinion of the whole Court of King's Bench, corroborative of Sir Wm. Blackstone's doctrine, whilst, on the other hand, we have the opinion of a private member of the house of commons, advanced in the course of a debate in that house. Thus then the matter rests in point of authority—In one scale is the opinion of Sir W. Blackstone; and in the other the contrary opinion of Mr. Dunning; but to the former the clear, solemn, and deliberate opinion of Lord Chief Justice Mansfield, and all the other justices of the Court of King's Bench is to be superadded, and when that is done, there cannot be a doubt which way the balances will incline. But in order to shew all reasonable respect to the opinion of so distinguished a character as the late Lord Ashburton, let us waive the question of authority, and proceed to examine what actually is the truth of the case upon sound argument and principle. The several rights and liberties which are vindicated and asserted in the declaration of the bill of rights are those particular rights and liberties, *solely* by the violation of which, King James is, in the same bill, alleged to have endeavoured to subvert and extirpate the protestant religion and the laws and liberties of the kingdom. The bill enumerates in the beginning the various illegal acts which the king had practised; and then follows the declaration of the illegality of those acts, and of the particular rights of the subject which had been violated thereby; each several article of declared right answering to some other article of violated right mentioned in the preceding part of the statute: thus in the preceding part the 7th article of accusation against the king, is—"By violating the freedom of election of members to serve in parliament," which is answered by the 8th article in the declaration of rights, that "Election of the members of parliament ought to be free." So the 2d article of accusation is—"By committing and prosecuting divers worthy prelates for *humbly petitioning* to be excused from concurring to the said assumed power," and this is answered by the 5th article in the declaration of rights, that—"It is

* See Doug. Rep. 592.

" *the right of the subject to petition the king*, and that all commitments and prosecutions for such petitioning are illegal."* This last article is the one which, according to Mr. Dunning, was meant to restore to the people that full privilege of petitioning which the said act of Charles was calculated to abridge, if not to take away; and which has had the effect of completely repealing that act. But it is obvious that the article in question was not intended to affect the act of Charles in the least, for it has a necessary reference to and connection with, the right which King James had infringed by punishing individuals for petitioning, as much so, as the above mentioned declaration of right with respect to the freedom of election, had to and with the preceding article, which speaks of the violation of that freedom. Had King James been acting under cover of the act of Charles, there might be some colour for Mr. Dunning's conclusion, but as the commitment and prosecution of single petitioners, or of any number under twenty was not warranted by that act, there is not the smallest reason for inferring that in rescuing the rights of the subject against the illegal conduct of James, and those rights too which were sanctioned by the statute of Charles, the legislature intended to interfere with that statute; and the whole act which contains the bill of rights relates solely to the violation of the rights of the subject by James, and to the establishment of them under the House of Orange.

That the said article in the bill of rights was not intended to have any relation to the act of Charles may be concluded also from the circumstance, that that article declares that it is the *right* of the subject to petition the king, and that all commitments and prosecutions for such petitioning *are illegal*. Now if they had meant the article to extend to the act of parliament of Charles, which had made illegal all petitions which should be signed by more than twenty, they surely would not have said that the subject had a *right* to petition contrary to the provisions of that act; they surely would not have declared those commitments and prosecutions illegal, which an act of parliament *then in force* had authorized and directed. To have done so would have been shew-

* See 1 W. and M. st. 2. c. 2.

ing but little respect to former parliaments, or to the dignity of the legislature itself. Nay, it would be saying to the subject—your right exists, and it would be illegal in any one to attempt to abridge it, although there is a regular and positive act of parliament to forbid your exercise of it.

Again—the act of Charles prohibits petitions with more than the limited number of names, either to the king, *or both or either houses of parliament*: but the article in the bill of rights goes *only* to petitions to *the king*; and yet according to Mr. Dunning the act of Charles, which extends to both or either houses of parliament, as well as to the king, was completely repealed by that article! The truth of the case, however, seems to be, that the act of Charles neither was in point of fact, nor was intended to be repealed either wholly or in part by that article, and that the statute of Charles is now in full force. For the above reasons, therefore, it does not appear to me either to be so puerile and absurd a thing as Mr. Dunning supposed, to argue that the act of Charles is now in force; or indeed, that there is now any room for a question to be made, whether the declaration contained in the bill of rights, was not in this particular a repeal of the 13th Car. II. as the learned editors of Coke upon Littleton have expressed it to be* their opinion.

* Co. Litt. 257, s, note 3. Edit. Har. and But.

CHAP. V.

"THE commons consist," says Sir W. Blackstone,* "of all such men of any property in the kingdom, as have not seats in the house of lords; every one of which has a voice in parliament, either personally or by his representatives." Upon which passage Mr. Sedgwick observes† as follows: "Without remarking that the *commons in parliament* are here confounded with the *commons at large*, the assertion itself, as to every meaning plainly and *prima facie* conveyed by it, is altogether unsupported; since all property, whatever be its amount, that is, either copyhold, leasehold, or personal, is excepted from all the benefits under the constitution which this appearance by procuration in the senate is held to confer." But with respect to the commons in parliament being confounded with the commons at large, the very contrary is the fact, for Sir W. Blackstone clearly means the commons at large *only*; because immediately before he had been speaking of the nobility *as a body*, (not of the lords in parliament) and the necessity of their having a distinct assembly from the commons; and when therefore he goes on to say, that the persons he is speaking of have a voice in parliament either personally or *by representation*, he must necessarily mean the *commons at large*, and not the commons house of parliament.

The author of the 'Remarks' seems to suppose that such persons as those whose property is not of a nature to give them a vote for members of parliament are not represented, for his objection to the learned commentator's observation that "all men of any property have a voice either personally or by their representatives," is grounded upon the argument that there are many men of copyhold, leasehold, and personal property who are excepted from appearing by procuration in the senate. But as every

* Com. v. 1. p. 158.

† Rem. p. 110.

member, though chosen by a particular district, serves for the whole realm,* and as the house of commons is by representation the commons at large, it may be truly said that persons of copyhold, leasehold, and personal property have a voice in parliament by their representatives, although they have no vote at any election for the choice of particular members.

But the gentleman misapprehends the learned commentator in supposing him to speak of a property *in right of which* individuals among the commons at large have a voice in parliament, either personally, or by representation. In saying that the commons consist of all such men of any property, &c. he merely means all such men as are not in so mean a condition of life, for want of some kind of substance or property, as that they cannot be supposed to have any will of their own. Thus, when speaking of the qualifications of electors, he says, that—"The true reason of requiring any qualification, with regard to property in voters, is to exclude such persons as are in so mean a situation, that they are esteemed to have no will of their own.†" Persons of the latter description the law does not suppose to be free agents: all, however, of any property—in other words, who can be supposed to be free agents, have a voice either personally or by representation, for as the learned commentator observes, "Only such are entirely excluded as have no will of their own;" and there "is hardly a free agent to be found, who is not entitled to a vote in some place or other in the kingdom."‡

It is most extraordinary indeed that Mr. Sedgwick should have supposed the learned commentator to mean, that every one of the commons at large has a voice in parliament in right of the property of which he speaks, when four-fifths of our members of parliament are not sent by persons who have votes in right of property, but as being the inhabitants of particular boroughs, &c.

Sir W. Blackstone observes,§ that—"In a free state, every man, *who is supposed a free agent*, ought to be, in some measure, his own governor; and therefore a branch at least of the legislative power should reside

* Com. v. 1. p. 159. † Ibid. p. 171. ‡ Ibid. p. 172.

§ Ibid. p. 158.

"in the whole body of the people." In answer to this it is said by Mr. Sedgwick, that—"As man is created a *free agent*, 'so in every state, in a free state more especially, what 'every individual *actually* is, every individual should be 'supposed to be.' But this is a strange doctrine, which holds that every man ought to be supposed a free agent because he was created one; for there are many men in every state who were created free agents, and yet are wisely and justly regarded by the state as not being free agents; for example, those whose crimes have caused them to be immured in prison. So all who have been convicted of perjury, or subornation of perjury, all who are destitute of any property, and others whom the constitution does not consider as being likely to vote freely, and without influence, are disqualified from voting at elections, although they were created free agents. It must be observed also, that when the gentleman contends that every individual should be supposed to be a free agent, he quarrels with the law itself, and offers nothing against that exposition of it which Sir W. Blackstone hath made.

'To argue, however,' continues the author of the Remarks,* 'that because every free agent ought to be, in 'some measure, *his own governor*, that, therefore, a branch 'at least of the legislative power should reside in the 'whole body of the people, is to deduce a conclusion by 'no means necessarily connected with the premises. In 'the private affairs of life, the position that man ought to 'be, in some measure, his own governor, is sufficiently 'true. But civil and official authority is not, as we are 'here led to conclude, annexed to human nature, and to 'free agency.' Sir W. Blackstone, however, does not mean, that the right of being one's own governor in the private affairs of life, draws to it a title to civil or official authority. His position is that "in a free state, every "free agent ought to be in some measure his own "governor," and of course means in matters concerning the state, and not the private affairs of life: in other words, his meaning may be expressed thus—In a free state the laws by which its free agents are to be governed, ought previously to have received in some measure their privity and approbation. No such conclusion, therefore, as the author of the 'Remarks' supposes, is meant to be deduced by Sir W. Blackstone.

* Rem. p. 110, 111.

'In whatever relates to polity, and the enactment of laws which affect in their operation the well-being of the whole, every man becomes,' says Mr. Sedgwick,* 'the governor of every other man; a right which no individual can arrogate to himself on the ground of natural freedom.' It is admitted that natural freedom does not entitle any individual to be the governor of another, for it constitutes the ground-work of Sir W. Blackstone's doctrine, which is, that in free states, the free agents of it ought to have some concern in deliberating either personally, or by being represented, upon the laws by which they are to be governed.

The author of the 'Remarks,' in the next place, puts some questions to which we are induced to reply solely from an unwillingness to pass over in silence any thing which he seems to consider of any importance. It is asked†—'If moreover it be admitted that a branch at least of this legislative power should reside in the whole body of the people, in whose hands, it may be asked, shall the residue be placed?' The answer to which is, that in order to guard against the inconveniences of a democracy it should be placed where it is by the constitution placed—in the crown and the house of lords, who are not included under the term, the commons.

'Ought the other coactive depositaries of this power to possess a negative on the will of the whole body? † It is highly salutary to the state that they should for the reason which the learned commentator hath given in page 51, and which have already been advanced in reply to some former observations of Mr. Sedgwick.‡ 'If it be avouched that they ought not, what need is there that any share be taken out of the hands of its original and natural possessors?'§ An answer to this question is unnecessary, the preceding one having been replied to in the affirmative. 'If that they ought, must not the practical exercise of it annihilate that power, whatever be its measure, which the multitude, in virtue of their free agency, ought uncontrolledly to enjoy?'|| The first notice to be taken of this question, is, to remark—that Sir W. Blackstone's observation is, that a *branch* of the legislative

* Rem. p. 111. † Ibid. ‡ See supra, p. 35, et seq.
§ Rem. p. 111. || Ibid.

power should reside in the body of the people ; but not that they ought *uncontrolledly* to enjoy that power. To have said that the people should enjoy uncontrolledly the power, or a branch of the power, of legislation, and to assert, at the same time, that the other branches ought to possess a negative upon the exercise of that power, would have been a gross contradiction. Did the gentleman look upon his argument to be in a condition so forlorn as to render it necessary for him to deviate from the path of fair discussion, by edging in this word *uncontrolledly* ? In having so done, however, the learned commentator is indebted to him for the imputation of having been the author of certain absurdities which it would be injustice towards both not to observe, that they are purely of Mr. Sedgwick's creation.

In answer to the question, when detached from that with which it ought never to have been mixed, it is to be observed, that the practical exercise of the negative by the other branches does not annihilate the power in question, as hath been already contended in answer to a former argument.*

Speaking of the great difficulty and inconvenience which in so large a state as ours would attend an exercise of the legislative power by the people in their aggregate or collective capacity, Sir W. Blackstone remarks† that—"it is therefore very wisely contrived, that the people "should do that by their representatives which it is impracticable to perform in person." Upon which the author of the 'Remarks' observes‡ that—"Arguing from 'the principle couched in this position, we are authorized to aver, that every member of the commons' house of parliament is bound to advise with his immediate constituents, whose vice-agent he is ; to promote their particular views ; and to declare, and, if possible, to enforce that will, which they themselves, or the majority, were they personally present, would be desirous to give effect.' But whether a representative is bound to advise with his constituents, or not, as to the line of conduct which he shall pursue, whether it is incumbent on him to declare and enforce the will of his constituents, or whether he is not to vote according to his own opinion

* See *supra*, p. 37. † Com. v. 1. p. 159. ‡ Rem. p. 111, 112.

—are questions which for their solution depend altogether upon the nature and extent of the delegated power, and the purpose for which he is elected. Then, what is the object of his being sent to parliament? It will appear from the writ of summons, that the electors are summoned to return a person, for the purpose of *advising* his majesty *super negotiis quibusdam arduis et urgentibus*, and not for the purpose of declaring their will, and of acting as their proxy upon every occasion. It is not to be inferred from the above passage in the Commentaries, that the representative ought to do *those particular things* which the majority of his constituents would wish, and would themselves do, if they were personally present. His expression, it is true, is, that the people should do *that* by their representatives which it is impracticable to perform in person. Do what?—Why, exercise that *power of legislation* which immediately before he informed us, that, in so large a state as ours, they could not exercise in their collective capacity. It is that power therefore with which they are invested, and he may correctly be said to be the representative of others, who has had delegated to him such a power, and who is to exercise that power (as they themselves, who delegated it, might have exercised it) according to his own judgment and discretion; and his constituents may be said to exercise their power of legislation, by him to whom they have referred that power; for the word representative does not necessarily mean, that the person filling that character is the mere agent or proxy of those whom he is appointed to represent. There is nothing therefore ‘inconsonant and ‘contradictory,’ in supposing him at liberty to reject the instructions of his constituents.

That he is to serve for the whole realm when chosen, and is not appointed to express the will and pleasure of his particular constituents, will be seen further from a more full examination of the writ of summons already mentioned, which expresses the purpose for which representatives are to be sent, as it states that two persons shall be chosen—*ad faciendum et consentiendum his quæ tunc ibidem de communi concilio nostro anglia et ecclesia anglia (favente deo) contingerent ordinari super negotiis antedictis*; and which in the former part of the writ are declared to be *pro quibusdam arduis et urgentibus negotiis*

nos statum et defensionem regni nostri anglia et ecclesia anglicana concernentibus.

It is from this writ of summons that Sir W. Blackstone infers that a member of parliament is not sent "barely to advantage his constituents, but the *common* wealth;" and that "he is therefore not bound to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do."* With respect to this last observation of the learned commentator, Mr. Sedgwick says—'This being the case, how can it consistently be said, that every man of any property in the kingdom has a voice in parliament, either personally or by representation? If an individual has no active absolute share in the deliberations of an assembly, and those of whom it consists are at all times free to act without consulting his wishes, and even in direct opposition to them, what voice has such individual, and after what manner can he, in reason and plain sense, be said to be *represented* in that assembly?' As the person chosen fills the place of his electors by a vicarious character, and so personates them, those electors may accurately enough be said to have a voice in parliament by the representation of him to whom their powers have been delegated.

But the gentleman remarks that—'When once at liberty to act according to the dictates of his own unbiassed judgment, cut and quibble as we may, he is no longer the representative of *the will* of another.'† This is clear enough, but then Mr. Sedgwick has resorted to his favorite expedient of begging the question, which is whether the member be or be not the representative of the will of his constituents? If the person elected is merely delegated to be the proxy of his constituents, and to express what their will and wishes are upon every occasion, (and this he *assumes*) then certainly he cannot be said to be their representative, who is at liberty to vote and act according to his own judgment and discretion: but the meaning of the learned commentator, and what alone the gentleman had to contend against, is that he represents the persons of his constituents, and not their will; or in

* Com. v. 1. p. 159.

† Rem. p. 112.

‡ Ibid.

other words, *serves in the place and stead* of those who delegate to him those powers which it is impracticable that they should exercise in their own persons.

‘When we are informed,’ continues Mr. Sedgwick,* that—“Though the richest man has only one vote at one place, yet, if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives;” † either this intelligence carries no distinct meaning to the mind, or we are compelled to renounce the principle just before laid down, that—“every member, though chosen by one particular district, when elected and returned, serves for the whole realm; for the end of his coming there is not particular, but general.” ‡ The former passage was advanced by Sir W. Blackstone to shew that comparative wealth is not in the constitution of England wholly disregarded in elections, and it seems to me correct enough to say that if a man has a right to vote at five different places of election for members of parliament, that he hath as many representatives as those places send members; for certainly every individual represents the place which sends him although he serves for the whole realm; and the only superior advantage which a person enjoys who has a vote for many members of parliament, is, that he has a greater share in determining who shall be the *particular individuals*, that are to constitute the house of commons. But, after all, these criticisms of Mr. Sedgwick, upon the chapter on the parliament, might well have been spared, for the learned commentator himself says, “This is the *spirit* of our constitution: not that I assert it is in fact *quite so perfect* as I have here endeavoured to describe it; for, if any alteration might be wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people.” § The author of the ‘Remarks’ has not ventured to dispute that the theory and spirit of the constitution is not as Sir W. Blackstone represents; but hath met the learned commentator’s observations, as if it had been meant that *in practice* and *in fact* the constitution is as the spirit of it had been made to appear

* Rem. p. 112, 113. † Bl. Com. v. 1. p. 172. ‡ Ibid. p. 159
§ Com. v. 1. p. 172.

It is further remarked,* that this language of Sir W. Blackstone, ‘supposes what is very erroneous—that the number of suffrages which each individual should possess, *ought, in justice*, to be determined by the extent of his territorial property, and to be multiplied according as it happened to be parcelled out in different quarters of the kingdom.’ But Sir W. Blackstone was giving no opinion upon the justice or propriety of the measure; for he merely states the fact; and having remarked† that “our constitution steers between the two extremes of property and numbers,” adduces the above fact with respect to a person having many representatives if his property be at all diffused, as an instance, that comparative wealth is not entirely disregarded.

Mr. Sedgwick, in the next place, offers some remarks upon the subject of a more complete and equal representation of the people; but as they do not involve the consideration of any of the doctrines contained in the Commentaries, it is unnecessary to enter into any scrutiny with respect to them, and we shall therefore proceed to the next position of the learned commentator to which that gentleman raises any objection. “Every branch of our civil polity,” says Sir W. Blackstone,‡ “supports and is supported, regulates and is regulated, by the rest; for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits;” and Mr. Sedgwick’s remarks upon it is, that—“the public legal authorities of government have no interest separable from that of the state; they cannot, consequently, possess any separate interest as between themselves.”§ But it is notorious that each has in some respects distinct powers and privileges. The crown, for instance, might endeavour to enlarge its prerogatives; or the commons might take upon themselves to change or amend a bill affecting the rights of the peerage; or the lords might attempt to exert a power of altering or attending money bills; or the lords and commons together might seek to encroach upon the prerogative of the crown;

* Rem. p. 113. † Com. v. 1. p. 172. ‡ Com. v. 1. p. 155. § Rem. p. 124.

and what the learned commentator means, is, that the jealousy of each as to an increase in the power of either of the others, and consequently a diminution of their own relatively, tends to keep every one within proper limits.

Mr. Sedgwick in the next place denies, that the power of parliament in making and altering laws, can be said to be *despotic, absolute, and uncontrolable*, because, 'all authority, in all cases, and wheresoever vested, is limited by the purposes for which it was bestowed. How, moreover,' he asks, 'can this doctrine of parliamentary omnipotence be consistently taught by any one, founding all government on the basis of mutual compact? How is it reconcileable with that consent of the people which is deemed so essential to the validity of all public acts, as to be assumed as a first principle by our author in all his disquisitions on the subject of political power?*' Now it will be seen that the learned commentator's observations in this place are perfectly consistent with every thing which he may elsewhere have advanced; for he admits immediately after,† the accuracy of the *theory* of Locke's doctrine, which is that the power vested in the legislature is a *trust*, and that when that trust is abused, it is thereby forfeited and devolves to the people. But then as the same act which causes this devolution of power, would be a dissolution of the whole form of government, and destroy the constitution established by the people, no legal steps could be taken for carrying the above conclusion (however just in theory) into execution, under any dispensation of government at present actually existing. The fair exposition of Sir Wm. Blackstone's observations, is not that the power of parliament is despotic, absolute, and uncontrolable, with respect to any unconstitutional exercise of it over the people; for he admits such power *to cease altogether* when an abuse of it takes place; but he must be understood to mean that it is despotic, absolute, and uncontrolable, so long as it is rightfully exercised, that is, so long as it continues to exist. Nay, we are not left to infer his meaning, for he winds up the whole by saying in express terms,‡—"So long therefore as the *English constitution lasts*, we may venture to affirm,

* Rem. p. 124, 125. † Bl. Com. p. 161, 162. ‡ Ibid. p. 162.

"that the power of parliament is *absolute and without control.*"

As examples of the great power of parliament, Sir W. Blackstone observes* that "it can alter the established religion of the land; and can change, and create afresh the constitution of the kingdom and of parliaments themselves." In answer to which Mr. Sedgwick says,† that 'the power of parliament is not more valid to change, than it is to subvert, the religious or civil establishment of the country, wherever such innovation would not redound to the general advantage.' But this is not disputing that they have not the power; or rather it is making the existence of power itself, dependent upon the good or evil consequences resulting from the exercise of it. The question, however, is, has the parliament the power, subject to their own discretion in the exercise of it? That it hath, as to the religion of the land, appears from the established religion having been altered in the reign of Henry VIII. and his children: and that it possesses such a power as to the constitution of the kingdom, and of parliaments themselves, appears, from the act of union and the statutes for triennial and septennial elections.

With respect to any innovation, which would be to the palpable disadvantage of the people, as for instance, giving to the royal proclamations the force and validity of a public law, inasmuch as such an act would be a glaring proof of the gross corruption of the legislature, as well as an iniquitous violation of the trust reposed in them, it would be the death blow to their own authority and a dissolution of the government. The position therefore that parliament has the power to alter the established religion of the land, &c. is not shaken by the opposition which Mr. Sedgwick has made to it, for if they have the power to make such an alteration where it would redound to the general advantage, and this, even that gentleman does not dispute, then it is evident that parliament possesses such a power as the learned commentator asserts.

* Bl. Com. p. 161.

† Rem. p. 125. †

CHAP. VI.

The next observations in the Commentaries upon which the author of the 'Remarks' animadverts, are upon the subject of the consequences resulting from the misconduct of King James, and of the measures taken by the convention parliament thereupon. "It is worthy observation," says Sir W. Blackstone,* "that the convention in their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of King James amounted to an *endeavour* to subvert the constitution; and not to an actual subversion, or total dissolution of the government, according to the principles of Mr. Locke, which would have reduced the society almost to a state of nature; would have levelled all distinctions of honour, rank, offices, and property; would have annihilated the sovereign power, and in consequence, have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity. They, therefore, very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne; whereby the government was allowed to subsist, though the executive magistrate was gone, and the kingly office to remain, though King James was no longer king. And thus the constitution was kept entire; which upon every sound principle of government, must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished or even suspended." It is once more to be shewn that Mr. Sedgwick has again taken up the learned commentator's observations in a sense very different from their obvious import; and that by so doing he does not contend against the reasoning in the Commentaries, but opposes a shadow of his own raising. The gentleman asks, in his answer to the above remarks,

* Com. v. 1. p. 212, 213.

‘wherein does a government dissolved differ from a constitution broken up and annihilated? To a plain understanding they seem convertible phrases, and that the consequences to result from the one, must flow in like manner from the other.*’ Now a person who had not read the above citation from the Commentaries, would be induced to presume from the last question and remark by Mr. Sedgwick, that in Sir W. Blackstone’s opinion, the government of a state might be dissolved, and the constitution continue; notwithstanding; but it is difficult to conceive how the gentleman can gather from that citation, that there was supposed to exist any difference between an actual subversion of the constitution, and a total dissolution of the government, for in speaking of such an actual subversion or total dissolution, the learned commentator merely meant to substitute another expression, to represent the same ideas. This, as well as that he thought the same consequences would result from an actual subversion, as from a total dissolution, is evident, for the relative pronoun *which* immediately following, refers alike and with equal propriety either to the subversion of the constitution or to the dissolution of the government.

Mr. Sedgwick proceeds to ask—‘who will deliberately affirm, that on *any*, much less on *every* sound principle of government, even THE SUSPENSION of the royal authority, if for the security of the kingdom (as was the case here) it had been thought expedient to suspend it, must of necessity destroy all accustomed authorities, have harrowed up and broken to pieces the existing fabric of government; have levelled all distinctions of station and property, and have left us every thing to begin anew?’ But what of argument have we here? Sir William Blackstone deliberately affirms that certain consequences would ensue a suspension of the royal authority, and to prove that the affirmation is not correct, the gentleman inquires who will affirm it!

The consideration of what remains of his observations upon this subject must be postponed until we have offered a few remarks in support of the learned commentator’s doctrine—By the *royal authority* then, is meant the

* Rem. p. 151.

kingly office, which he supposes capable of remaining after the executive magistrate is gone. Now the royal authority, or *kingly office*, is an essential constituent part of the constitution. If, by any cause, that authority or office be gone absolutely, or suspended, the constitution must fall to pieces; because it thereby loses its principal ingredient, its chief component part.—If, by the constitution, the government consists of the *kingly office*, the lords spiritual and temporal, and commons, it is obvious, that it must cease, when either of them is wanting. But the abdication of the king does not take away from the constitution the *kingly office*. It is merely personal, and affects not the system. The *kingly office* is no more suspended by such an abdication, than the commons estate is suspended by a dissolution of parliament. The constitution still continues, because all the integral parts continue. To consider the abdication of the reigning prince as amounting to the annihilation of the office which he filled, together with the whole system of which that office was a part, would be putting it in the power of a trustee to root out that system, with a management of a branch of which he was entrusted. The distinction between a suspension of the *kingly office* itself and a vacancy in its being filled, seems to me therefore substantial; and to authorize the ground upon which the convention acted, when they allowed that the *kingly office* subsisted although the person who lately filled it had abdicated.

We return to the 'Remarks'—where Mr. Sedgwick also asks* 'Can no people, whatever rigour of oppression menace them, give themselves a new monarch, without giving themselves over at the same time to all the horrors which await the annihilation of their whole system of civil government? If in order to preserve entire the blessings of a legal and free constitution, they depose the sovereign that would subvert it, must they, in the very act of preserving, dissolve and destroy it, and become themselves the fated instrument of the very evil they would escape?' Upon which it will be sufficient to observe, that nothing of the kind that these questions would imply, hath been directly or indirectly advanced by the learned commentator. His doctrine is this—If the *kingly office* be suspended, it amounts to a dissolution of the government;

* Rem. p. 151.

if the throne be merely vacant, the government still continues entire.

With respect to the REVOLUTION itself, continues Mr. Sedgwick, and the memorable conduct of our ancestors in that event—"The reasons upon which they decided," (the learned commentator informs us)* "may be found at large in the parliamentary proceedings of the times; and may be matter of instructive amusement for us to contemplate, as a speculative point of history. But care must be taken not to carry this inquiry farther, than merely for instruction or amusement. The idea, that the consciences of posterity were concerned in the rectitude of their ancestors' decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are all happily extinguished. I therefore," the learned commentator subjoins, "rather chuse to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience; because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient." The learned commentator adds also: "Whereas, our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty at this distance of time to acquiesce in their determination; being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it." Mr. Sedgwick asks,† 'Wherefore rest this memorable transaction upon the solid footing of authority, rather than to reason in its favour from its justice, moderation, or expedience?' The answer to which question is, not because Sir W. Blackstone thought that it would 'shrink from the test of such a scrutiny;' not because he thought that it would not bear to be examined upon those grounds, as Mr. Sedgwick would insinuate; but, in the learned commentator's own words, "because that might imply a right of dissenting or revolting from it, in case we should think it to be unjust, oppressive, or inexpedient;" a right which in his opinion we do not possess.

* Com. v. 1, p. 212,

† Rem. p. 153.

But the author of the 'Remarks' asserts, that—'If this great political measure was neither just, nor moderate; nor fitting; the authority upon which we would find support it, can itself have no solid footing; nor can serve as the satisfactory basis of our acquiescence: it was, in this case, no better than an unwarrantable exertion of illegal power, and leaves us as valid a right, to the full, of dissenting or revolting from it, as we could imagine ourselves to possess in whatever other light we might choose to contemplate it.' But what, we would ask, is to be the test by which that measure is to be tried? Is it indeed competent to every individual, who, through the blindness of his half-informed mind, may fancy that he sees something that was neither just, nor moderate, nor fitting in the measure? Is it competent to him to pronounce the authority by which that great political measure was effected to have been an unwarrantable exertion of illegal power? And is there in consequence left to him a valid right of dissenting or revolting from it? The gentleman surely could not have adverted to the dire consequences which this doctrine of his would, if practically adopted, produce; for what is it but saying, that if individuals form an opinion of the want of justice, moderation, or utility in any political measure, they have a right to dissent or revolt from it? The constitutional tone in which that gentleman expresses himself throughout his work in general, leaves us no room to doubt that his observations last taken notice of were an oversight.

It is asked also* 'If this grand event is to be slurred over, as incapable of resting on its own substantial merits;' and 'if it is grateful, if it is generous, thus to stigmatise that august event, and indirectly to calumniate those who conducted it?' The answer to those questions has been already in part anticipated. The learned commentator did not decline to examine into the merits of the measure for any such reason as that he thought that they would not bear a scrutiny; but because he did not deem the consciences of posterity to be so far concerned in the rectitude of their ancestors' decisions, as to render such inquiry necessary; and because he thought (contrary to the opinion which his assailant has inadvertently expressed

* Rem. p. 153.

in this respect,) that whatever the result of such an examination might be, we have now no right to dissent or revolt from that measure. But with respect to that event having been stigmatized, and those who conducted it indirectly calumniated by the learned commentator's observations, and the want of gratitude and generosity in so doing—against all such charges and insinuations, Sir W. Blackstone shall defend himself; and the passage which immediately follows the above citation will be sufficient for the purpose:—"But," says he,* "while we rest this fundamental transaction, in point of authority, upon grounds the *least* liable to cavil, *we are bound both IN JUSTICE AND GRATITUDE to add, that it was conducted with a TEMPER AND MODERATION, which naturally arose FROM ITS EQUITY*; that, however it might in some respects go beyond the letter of our ancient laws, (the reason of which will more fully appear hereafter) it *was agreeable to the spirit of our constitution and the rights of human nature.*"

* Black. Com. v. 1. p. 212.

CHAP. VII.

SIR W. Blackstone, in the 6th chapter of the first book of his Commentaries, when treating of the king's duties, and after stating it to be "a maxim in the law, that protection and subjection are reciprocal," observes,* "these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared that King James had broken the *original-contract* between king and people. But, however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law, in which deduction different understandings might very considerably differ; it was, after the revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince who hath reigned since the year 1688." Now Mr. Sedgwick, after stating† it to be 'wide of his present purpose to inquire into the originary causes of political supremacy, and to be perhaps *impossible* to assign them distinctly,' observes that§—'government is among the first and most pressing exigencies of man; that it is among the most valuable dispensations of that Providence by whom those wants are supplied:' and it is to be observed here, that although the gentleman in the outset stated it to be wide of his purpose to inquire into—nay, thought it perhaps *impossible* to assign—the originary causes of political supremacy or civil government, yet immediately after he communicates to his reader a discovery that government is a *dispensation of Providence*; and a discovery too which appears to have been deemed

* Com. v. 1, p. 233.

† Rem. p. 155.

§ Id. p. 156.

so important as to induce him to deviate wide from his avowed purpose, by promulgating it to the world. The discovery thus made, however, is to be regarded as being very near akin to the stale and exploded notion of a *jure divino* right, if not the very thing itself. So great appears to have been the influence and tendency of this doctrine upon the gentleman's mind, that the principle of a compact which Locke as well as Blackstone entertained, was not deemed worthy of being mentioned with any other than the most opprobrious epithets. 'For what reason,' asks Mr. Sedgwick,* 'should we seek to shroud its origin' (the origin of government) 'in mist and obscurity; or why urge the duty of obedience on a principle involving inconsistency, absurdity, and falsehood?' What kind of arguments are advanced to point out this inconsistency, absurdity, and falsehood we shall shortly see. But we have previously to notice some remarks upon the necessity of this contract being expressed.

'Wherefore,' the author of the 'Remarks'† enquires 'should we strive to establish this system of an EXPRESS, ABSOLUTE COMPACT? Did the revolution beget any new relation between the sovereign and the subject, or create any duties or moral ties which did not antecedently exist? Every express compact bespeaks, *prima facie*, its necessity; this necessity implies that the obligations founded upon it, would, without, having no existence; that the duties imposed by it are not in their own nature indispensable and coercive, but arise *ex contractu*, and are in themselves gratuitous, and dependant on our will.' It is thought to be a mode of argument perfectly novel, when a position is laid down and reasons advanced in support of it, for the person who questions its accuracy to attempt such a *refutation* as consists in asking if the fact be as it is stated, instead of endeavouring to prove that it is not so by combating the reasoning urged in support of it; and yet Mr. Sedgwick has more than once resorted to this most forcible method of working conviction in the minds of his readers. In the present instance, we shall answer the question of that gentleman by recurring to the observations of the learned commentator, from which we may collect that the necessity of the

* Rem. p. 136,

† Ibid.

contract being reduced to a plain certainty, and of declaring the reciprocal duties *expressly* arose from the circumstance that some doubts as to the existence of an original contract had sprung up in some minds of that particular cast which the learned commentator denominates weak and scrupulous; and that the utility of establishing the system of an *express* compact was to prevent any such doubts from being entertained by similar minds at any time afterwards.*

With respect to the *prima facie* implications of which the author of the 'Remarks' speaks, they will vanish before an accurate investigation of the subject. It is grossly incorrect to say, that out of the circumstance of the terms of an original contract having been expressed, there arises any implication that the obligations founded upon that original contract would have had no existence, but for its being so expressed, when the very act of parliament, in which those rights and obligations are so expressed, is absolutely a *declaration and avowal* that those rights and liberties are the ancient and indubitable rights and liberties of the people.—When there is not a syllable in it that favours the opinion that the act was deemed necessary to create any rights; but the whole goes to *define* those which *pre-existed*. The learned commentator cannot be supposed to mean that the contract did not exist before the revolution, for the direct and necessary inference from the whole of his observations actually is, that it did so exist—that “it was judged proper to declare those duties expressly, and to reduce that contract to a plain certainty†”—that the existence of an original contract was doubted by weak and scrupulous minds only; but that the terms of it were not expressed before, and only became necessary then to dissipate all doubts upon the subject.

We are now come to those observations which are to prove the inconsistency, the absurdity, and the falsehood of the principle of a compact. ‘Every express stipulation,’ says Mr. Sedgwick,‡ ‘implies a voluntary and unforced acquiescence. But in the case before us, is every individual free to withhold his assent, should he

* See Bl. Com. v, l. p. 233, and *supra*, p. 131. † Ibid.

‡ Rem. p. 157.

‘think proper? May the contracting parties at any time, ‘by mutual accord, renounce their duties, and recede ‘from their obligations? It will readily,’ (Mr. Sedgwick assumes,) ‘be replied in the negative. It follows, then, ‘that this is not a *consensual*, but a *compulsory compact*, which, is a contradiction in terms.’ It is difficult to imagine a more safe and easy mode of disputation than the one which the gentleman has here had recourse to. He puts his argument in the shape of a question, which he so adapts as that an answer to it may sanction the conclusion he aims at; then answers the question himself in the way which best suits his purpose, and without more ceremony draws his conclusion. Can the dullest of mortal men fail of being convinced by such ingenuity of reasoning? But it is very immaterial as to the subject under consideration what answer may be given to those interrogatories, for they have evidently been put under a mistaken notion, that the learned commentator considered the contract between the king and people as arising from the express declaration of the terms of that contract after the revolution; whereas that contract would have existed had it not been expressed at all at that period; for it is but a *declaration* of what was *previously implied* as will be further observed in the following page.

With respect, however, to the question whether the contracting parties may, by mutual accord, recede from their obligations,* it cannot be allowed that the gentleman has, in answering it in the negative, answered it correctly. It is held that the king, lords, and commons in parliament assembled can regulate or new model the succession to the crown, can change and create afresh even the constitution of the kingdom, and of parliaments themselves; but unquestionably, the nation at large, including the king, the lords, and the commons at large, are capable by mutual accord, to release each other from their relative obligations. The same power which creates, is certainly competent to dissolve an obligation.

‘To an absolute and express agreement, moreover, (continues Mr. Sedgwick) ‘the actual and express consent of all the covenanting parties is indispensably essential, since without this it cannot be constituted: and

* Rem. p. 157.

he afterwards cites Hume, to the effect that "It was only the succession, and that only in the regal part of the government which was then," (at the time of the revolution) "changed; and that it was only the majority of seven hundred, who determined that change for near ten millions." Now if we were to admit the truth of these remarks, it would not prove that government is not founded upon an original contract, although it could not be contended after such a concession, that the actual and express consent of all the parties was not given to the establishment at the time of the revolution; but, whether the consent of the people at large was had to that establishment or not, has no concern with the doctrine of an original compact; for those who have espoused that doctrine, do not date that contract from the period of the revolution, but from the first commencement of the constitution. They only assert that the terms of that original contract were, *at that time*, expressly defined. Even if it should be conceded that the seven hundred of whom Mr. Hume speaks, had no right to decide in that respect for the rest of the people, it would not shake the doctrine of an original compact in the least. It would merely prove that it is not obligatory upon us to accept the definition of those terms which was made by the convention parliament as the true one; leaving the question of an original compact precisely where it was at the time of the revolution.

But it is with as little accuracy as prudence asserted that it was only the majority of seven hundred who determined the alteration, which took place at the revolution, and that the matter was not left in the least to the choice of the people. One might suppose from Mr. Hume's statement, that these seven hundred had taken upon themselves to settle the business of their own will merely, without the solicitation or command of the people. But how stands *the fact*? It will be seen that they were delegated by the people for the express purpose. The act of settlement itself* states that the Prince of Orange, with the advice of the lords spiritual and temporal, and divers principal persons of the commons, caused letters to be written to the lords spiritual and temporal, being

* See 1 W. and M. 3, 2, ch. 2.

protestants, and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons to represent them as were of right to be sent to parliament to meet and sit at Westminster, &c. *in order to such an establishment* as that their religions, laws, and liberties, might not again be in danger of being subverted. The act then states, that such elections had been made, and then the lords and commons so elected proceed to declare the rights and liberties of the subject, and to settle the succession to the crown. Although, therefore, the actual and express consent of all parties was not *personally* given to the acknowledgment and declaration of the rights of the people, which took place at the period of the revolution, still their consent was duly signified, through the medium of persons sent to parliament with that very view.

So far, with respect to Mr. Sedgwick's observations as they were intended to be applied against the doctrine of an original compact: but it may not be amiss to say a word or two more upon the general doctrine laid down by him upon the subject of absolute and express agreements in the passage last cited from his work.—That gentleman is, certainly entitled to our concurrence in the position, that if an absolute and express agreement cannot be constituted without the actual and express consent of all the covenanting parties; that then, such actual and express consent must be indispensably essential; for that is the way in which he puts it—an actual and express consent is indispensably essential, 'since without this it' (that is, an absolute and express agreement) 'cannot be constituted.' Surely, however, no arguments can be advanced to prove that one man may not delegate to another full powers to act in his behalf, and so arrange for him certain terms of agreement with a third.—Surely none can be advanced to prove that the person represented ought not to be bound by the agreement so made; for the maxim, *qui facit per alium facit per se*, applies here in its full force.

It is further asked*—'Do not those who labour to substantiate this doctrine of absolute compact, tacitly admit that *that* alone can legalize a government; and that

without it, it would be little better than an usurpation 'on the natural freedom of mankind?' The answer to which is, that the persons alluded to do not tacitly admit this doctrine with respect to an original contract, at least, they do more, they openly avow it; they assert that protection is due from the king to the people, and subjection from the people to the king. They do not, however, say that any express or formal profession of those reciprocal duties is required to create them; thus Blackstone says*—"Doubtless the duty of protection is *impliedly* as much incumbent on the sovereign before coronation as after: in the same manner as allegiance to the king becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all."

'By what sophistry,' it is also asked, 'shall we reconcile the celebrated maxim of our constitution, that "the king can do no wrong," with the alleged breach of this convention?' There exists, however, a mode of reconciling these two apparently opposite propositions without any sophistry. The short answer would be, that the maxim is a supposition or fiction of law merely, which is not consistent with the reality. It never was supposed that that fiction could have any effect in preventing the king from doing wrong in point of fact; but merely signifies that *the law* would not take notice of that wrong in case it should happen. Wherever the law supposes that there is a possibility of any wrong being committed, it has vested an authority and jurisdiction for the redress of such wrongs. Now it is the policy of our constitution that the king should be so perfectly independent as not to be responsible before any tribunal; and consequently it became necessary to establish a maxim with respect to the king, that he can do no wrong, for otherwise there would have been this striking absurdity; the constitution would have supposed that a wrong might be committed for which the law could not provide any redress; and the maxim itself means simply that there exists no jurisdiction under our system of government which can decide upon or punish him for his misconduct.

* Com. v. l. v. 236.

But although in the above sense the law supposes the king to be incapable of wrong, yet it is not to be inferred that the people are bound to consider any acts of tyranny and oppression as right; nor, indeed, that the law so regards them; *Nihil enim aliud potest rex nisi id quod DE JURE potest*, says Bracton,* who also lays it down as a maxim of our law, that *Rex debet esse sub lege quia lex FACIT regem*. So Fortescue informs the Prince of Wales, afterwards King Edward the Fourth, that "A king of England cannot at his pleasure make any alteration in the laws of the land, for the nature of his government is not only regal but political; and that the king whose government is political cannot make any alteration or change in the laws of the realm, without the consent of the subject, &c."† And Finch also‡ says, "The king's prerogative stretcheth not to the doing of any wrong." It was one thing therefore to place so entire a confidence in the honour and integrity of James, (for example) as not to suppose him capable of wrong; but it would have been another and a very different thing, to have suffered that maxim to carry with it a conclusion that whatever he did must necessarily be right; and to induce the people to submit with patience to every wrongful act of his, however tyrannical, oppressive and unconstitutional. The maxim itself means also that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.§

Although, therefore, the constitution so far supposes the kings of England incapable of wrong, as to have rendered them independent of every tribunal which that constitution has established, yet is not that inconsistent with either the supposition of an original contract by which the king engages to protect the rights of the subject, or the possibility of that engagement being broken. It is true that in violating such an engagement he would do wrong; but still it was an act of which the constitution presumed him to be incapable, and for which it provided no remedy. The maxim that 'the king can do no wrong' is a political maxim, but it follows not that wrong may

* Bracton, l. 3. tr. 1. c. 9. † See Fortes. de lau. leg. Ang. c. 9.

‡ Finch's Law, 84, 85.

§ See Bl. Com. v. 1. p. 246.

not in point of fact be done by him, and be redressed, although not by any positive legal tribunal.—“All oppressions,” says Sir W. Blackstone, “which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal provision*: but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies. Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity, nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it.” And he instances the case of King James the Second. So the learned commentator in the same page admits the existence of certain “inherent (through latent) powers in society, which no climate, no time, no constitution, no contract, can ever destroy or diminish,” should circumstances justify their exertion. Thus in the case of King James, although he was considered by the law to be incapable of doing any wrong, and when he attempted to subvert the constitution, there existed no jurisdiction which could take the matter into consideration, yet still the same powers which rendered him independent of every tribunal, by not vesting any jurisdiction to decide upon his conduct and in conformity thereto established the above maxim—the same powers were exerted to redress those wrongs which he had committed.

Mr. Sedgwick also asks*—“How can we consistently affirm, that no power can absolve the subject from his allegiance, and at the same time found it upon the basis of reciprocal compact?” In return we would enquire how the gentleman can consistently entertain a doubt upon the subject after what he has himself advanced? He told us distinctly no farther back than the preceding page of his work, that it would readily be replied in the negative to the question, whether the contracting parties may at any time, by mutual accord renounce their duties and recede from their obligations;

* Rem. p. 158.

and yet he thinks it would be inconsistent to found allegiance (which is one of those identical duties which some of the contracting parties have incurred, and from which they cannot, it is said, be absolved,) upon the basis of a reciprocal compact. But if, as he asserts, the contracting parties cannot discharge each other from their duties and obligations, it is palpable that the subject cannot be absolved from his allegiance, which is one of those very duties.

We contended * that in answering his own question—
 ‘ May the contracting parties at any time by mutual accord renounce their duties, and recede from their obligations’ in the negative, the gentleman had not answered it correctly; and it now turns out that, to suit his own purpose, an affirmative answer should have been given to it. Even supposing, therefore, for the sake of the argument, that the learned commentator did say that no power can absolve the subject from his allegiance, it would be sufficient in reply to Mr. Sedgwick to prove the accuracy of that position, and its consistency with the doctrine of an original compact by citing the gentleman’s own argument that the contracting parties cannot even by mutual accord renounce their duties and recede from their obligations. Thus far, with the view of bringing home to the gentleman himself the charges of inconsistency and absurdity which he was desirous of fixing upon the learned commentator. It will be our purpose to prove, in the next place, that Sir W. Blackstone hath not been so inconsistent as to have affirmed that “ No power can absolve the subject from his allegiance,” at the same time that he founded it upon the basis of reciprocal compact. It must be admitted that such an affirmation (and Mr. Sedgwick attributes it to the learned commentator,) would be at variance with the doctrine of a reciprocal compact, since, as we have already contended, the contracting parties might, in case of such compact, by mutual consent, be discharged from their engagements; and the parties themselves would have a power to absolve the subject from his obedience. However, having attentively reperused the tenth chapter of the Commentaries, to which Mr. Sedgwick refers (and it is worthy of re-

* *Supra.* p. 134.

mark, refers *generally*, and not to the particular page as hath been done in other cases.) I feel myself justified in asserting most positively, that there is no such passage to be found in it, as that which he imputes to the learned commentator. Nay, instead of it being there said that no power can absolve the subject from his allegiance, it absolutely is laid down, that the allegiance spoken of "cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing *but* the united concurrence of the legislature."* Why is not that tantamount to saying that there is a power in the legislature which can absolve the subject from his allegiance?

Out of the three charges of inconsistency, absurdity, and falsehood, which were directed against the principle which the learned commentator espoused, the two former have been made to recoil upon the arguments and remarks of the gentleman himself; and with respect to the latter, most certain is it, from what hath been just now observed, that it attaches upon that adopted principle as little as the other two; but, if it shall be thought that that charge also recoils in like manner, it must previously receive an appellation less harsh and grating to the ear, for the respectability of the author of the 'Remarks' precludes our entertaining any other supposition, than that the above misrepresentation is solely the effect of misapprehension and inadvertency; but surely the invaluable work of Sir W. Blackstone should be treated with more respect. They who seek to controvert his doctrines should at least take the trouble to understand them.

* Bl. Com. v. 1, c. 10. p. 369.

CHAP. VIII.

MR. SEDGWICK commences his eighth chapter with some observations, of what is termed the new political philosophy; and although some citations from the Commentaries are made, yet as their accuracy is not disputed, it is foreign to my professed object to take them into consideration; and I shall therefore pass over the first four or five pages of that chapter, and come at once to the first position in the Commentaries, of the propriety of which that gentleman entertains any doubts.

"Wherever," says Sir W. Blackstone,* "the law expressed its distrust or abuse of power it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If therefore, (for example) the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature so subject to animadversion, would instantly cease to be part of the supreme power, the balance of the constitution would be overturned, and that branch or branches in which this jurisdiction resided would be completely sovereign." In saying thus much, Sir W. Blackstone, has in the opinion of Mr. Sedgwick, gone perhaps 'further than reason seems to warrant, or policy to require.† To withhold,' says he, 'the privilege of animadverting on the other, to reject the presumption of such a right existing in the separate branches of our constitution, were to withhold from the members composing them the means of fulfilling their highest and most urgent duty, and wholly to defeat the design, and annul the utility of a mixed government. But for this right of animadversion, in what could the imaginary balance here spoken of be held to consist?' Now it is obvious at first sight, that

* Com. v. 1. p. 244.

† Rem. p. 164.

Sir W. Blackstone uses the word *animadvert* in one sense, and Mr. Sedgwick in another, and upon the meaning which is attached to the word *animadvert* does the whole matter in dispute depend. Sir W. Blackstone means by saying, that "they have no right to animadvert upon the king or upon each other," that they have not any right to correct, pass censure upon, or punish the king, or each other, as is plain without looking further than the passage cited, where he speaks of a superior coercive authority to *correct an abuse of power*; whilst the author of the 'Remarks' argues upon the subject as if the learned commentator—in saying that the two houses and the king had no right to animadvert upon each other—had meant that they had no right to observe upon the acts and propositions of each other.

Taking the word *animadvert* in the latter signification, the learned commentator would have said that the balance of the constitution requires that they should animadvert upon each other's propositions. Thus he says, a few pages below,* "Yet still, notwithstanding this personal perfection, which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary in respect to both houses of parliament; each of which, in its turn, hath exerted the right of remonstrating and complaining to the king, even of those acts of royalty which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne."

No honour in the way of disputation is to be acquired, by those who will *not* take the trouble to *understand*, or who *will* take the trouble to *pervert*, the true and legitimate signification of the positions they combat, by advancing arguments which proceed upon the assumption that the most important words in such positions, are used in a sense different from what they obviously carry, when connected with the context.

The next position of Sir W. Blackstone which Mr. Sedgwick controverts is the following: "In farther pursuance of this principle, the law also determines that

* Com. v. 1, p. 247.

“ in the king there can be no negligence, or *laches*, and, therefore no delay will bar his right. *Nullum tempus occurrit regi* is the standing maxim upon all occasions.”* ‘This position,’ says that gentleman,† ‘must not be received in all its latitude. The above maxim is subject to various exceptions, both by common law and by statute. There are numerous instances in which the subject may make title against the king by *prescription*; as to treasure, trove, waifs, estrays, and such other things as may be seised without matter of record. And he refers to Co. Litt. 114, as an authority.’ It must be observed, however, that although it is said in the place referred to by the author of the ‘Remarks,’ that a man may make a title by usage and prescription only, without any matter of record to treasure, trove, waifs, &c. &c. as contradistinguished from such franchises and liberties as cannot be seised or forfeited, before the cause of forfeiture appear of record; yet, there is not a syllable to show that a title may be made against the king by prescription; and the reason why a title cannot be made to the franchises and liberties last alluded to, is, that as they must themselves arise by matter of record, they cannot be claimed by any inferior title than matter of record; and therefore cannot be prescribed for, but must be claimed by grant entered on record.‡

But a short investigation of the principles of things will convince us that a title cannot be made against the king by prescription at all. The title by prescription is in all cases founded upon the presumption, that originally there was an actual grant of the thing prescribed for. “Every prescription,” says Sir W. Blackstone,§ “presupposes a grant to have existed;” but with respect to corporeal hereditaments, and all such other things as did not admit of being privately given away by grant, it was thought that more certain evidence of the title might be had than immemorial usage, and a title by prescription was consequently deemed insufficient. “No prescription,” it is also said,|| “can give a title to lands and other corporeal substances of which more certain evidence may be had.” Now, all the king’s grants are

* Com. v. 1. p. 247.

† Rem. p. 167.

‡ See Bl. Com. v. 2. p. 265. § Ibid. || Ibid. p. 264.

matter of public record; and consequently wherever any grant was made by the crown the record itself may be adduced as an evidence of the fact. It is evident therefore that a title cannot be made against the king by prescription for "the law only allows of prescription in supply of the loss of a grant;"* and here the grant itself or the record thereof may be shown, if ever it existed.

The next instance of what he deems exceptions to the above maxim which is adduced by the author of the Remarks, is equally unsubstantial. He tells us† that 'In some cases the king's right necessarily fails, for want of exertion in due time, either because the subject of his right determines before he claims it, or because it is specially limited in point of time by its creation, as where the land of tenant for life is found to be forfeited, and he dies before seizure by the king: for it is then too late to seize for the king.' Now, had the king seised upon the forfeiture being found, he would not have been entitled to hold beyond the duration of the estate forfeited, that is, after the death of the tenant; of course if the king should neglect to claim until the determination of such estate, he cannot claim afterwards; for his right must of necessity cease when that estate by the forfeiture of which the right was created is spent. The last case then does not constitute any exception to the maxim, and that of his being entitled to the next presentation is in the same circumstances.

With respect to the case of a presentment by the king to a benefice already full‡—it has nothing to do with the maxim *nullum tempus occurrit regi*; for the reason why the ordinary will not receive the presentee of the king, is, because there is no vacancy, the church being full at the time of the king's presentation, and not because there has been any negligence or laches in the king. The present incumbent must therefore be removed before the king can present another. The king's right is not barred by any lapse of time, for it is only necessary for him to remove the present incumbent by a

* See Bl. Com. v. 2. p. 265. † Rem. p. 167. ‡ Ibid. p. 168.
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quare impedit before that right can be exercised with effect.* Mr Sedgwick therefore has not made good his assertion that those maxims are subject to any exceptions by the common law.

The maxim, however, is, it must be confessed, subject to an exception by statute, but not to various exceptions, as Mr. Sedgwick supposes. Indeed the learned commentator himself in a subsequent part of the Commentaries admits that to be the case. Thus, when speaking of the statutes 21 Jac. I. c. 2, and 9 Geo. III. c. 16, (the very statutes which Mr. Sedgwick has brought forward) the learned commentator concludes by saying†—"so that a possession for sixty years is now a bar even against the prerogative, in derogation of the ancient maxim *nullum tempus occurrit regi*." Sir W. Blackstone, therefore, was not ignorant that there existed an exception with respect to the case which is the object of the two last mentioned statutes, although it would have been more consistent with his accustomed correctness if in laying down the rule in one part of his work he had at the same time adverted to that exception.

"After what has been premised in this chapter I shall not (I trust)" says Sir W. Blackstone,‡ be "considered as an advocate for arbitrary power, when I lay it down as a principle, that in the exertion of lawful prerogative, the king is and ought to be absolute; that is, so far absolute that there is no legal authority that can either delay or resist him." Upon this passage Mr. Sedgwick observes§—"That in the exertion of *lawful* prerogative the king is and should be absolute is a truth seemingly incontestible;" but he seems to think that to be "so far absolute that there is no legal authority that can either delay or resist him" is in plain truth *not to be absolute at all*. What *legal* authority, he asks, can resist or retard the sovereign in the exercise of his lawful prerogative? If the prerogative exerted be lawful, he adds, 'is it not self-evident that the antagonist authority must be unconstitutional and invalid.' In taking notice of the above remarks it will be in the first place observed that the learned commentator alludes to what has been before

* See 2 Inst. 258. Cro. Jac. 385.

† Com. v. 1, p. 307.

‡ Com. v. 1. p. 250.

§ Rem. p. 168.

premised by him in the preceding part of the chapter, in the course of which he had touched upon the subject of unconstitutional oppressions which may happen to spring from any branch of the sovereign power; and had said that upon such emergencies, the prudence of the times must provide new remedies; but the author of the 'Remarks' cites the Commentaries as if no such allusion had been made. It is to be observed also that that gentleman does not seem to take the distinction between the exercise of lawful prerogative and the lawful or unlawful exercise of such prerogative. That such a distinction exists is readily demonstrable. The king has a lawful prerogative to make a treaty with a foreign state which shall irrevocably bind the nation; but should that treaty be palpably prejudicial to the interests of his people, most clearly it would be an unlawful exercise of that prerogative. What is prerogative? The learned commentator hath adopted the definition of Locke, according to whom it consists in "the discretionary power of acting for the public good where the positive laws are silent." The absolute power is given and a confidence is reposed that it will be exercised with a view to promote the public good.*—But should it not be so exercised, but on the contrary to the injury of the state and to the destruction of the rights and liberties of the subject, still there would be not *any legal* authority that could delay or resist him in the exercise of it; for the constitution has no where vested an authority to try the king in a criminal way for any abuse of such his prerogative.

But although the constitution has not prescribed any local jurisdiction, and the law feels itself incapable of furnishing any adequate remedy for this purpose, it was nevertheless necessary in treating of this subject to contemplate the possibility of a power not *legal* being exercised to delay and resist an abuse of the prerogative. Sir W. Blackstone clearly glances at such abuses as would be a breach of the compact between king and people, and would warrant the people at large in resisting tyranny and oppression. Had he not limited and qualified the sentence, it would have imported that the king is, and ought to be so absolute as that all his acts, how-

* On Gov. 2, § 166. * Bl. Com. v. 1, p. 252.

ever cruel and unjustifiable, ought to be submitted to; but in saying that he "is and ought to be so far absolute, that "there is no *legal authority*," &c. he judiciously excludes such resistance, as may be made should it ever again be necessary (as it was in the case of James II.) to recur to first principles upon the supposition of the original contract being broken. This is so clear from what follows in the very same page, that it must be matter of surprise that Mr. Sedgwick should not have observed it, "For otherwise (that is, without his being so absolute,) "the power of the crown would indeed be but a name "and a shadow; insufficient for the ends of government, "if, where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey "it, in the ordinary course of law: I say (he adds) in "the *ordinary* course of law; for I do not now speak "of those *extraordinary* recourses to *first principles*, which "are *necessary* when the contracts of society are in danger of dissolution, and the law proves too weak a defence "against the violence of fraud or oppression."* After what has been advanced; it is trusted, that the sentence objected to will in all respects be thought to have been perfectly correct.

It remains for me to add a remark or two more upon the statements of the author of the 'Remarks,' who asks if even the most obscure public functionary ought not to be thus absolute? The answer to which is, that most certainly he ought not to be so absolute, in the exertion of his lawful office, because he may misconduct himself in an office lawful in itself; and therefore ought to be amenable to society, and to have his conduct subject to the examination and animadversion of the higher tribunals, which, by the constitution, are invested with the necessary powers for the purpose.

The gentleman says also, with respect to the king being absolute in the degree which the above passage in the Commentaries, imports that in plain truth it is 'not to be absolute at all,' and then immediately asks. 'What legal authority can resist or retard the sovereign in the exercise of his lawful prerogative?' It is admitted on all hands that there is no such legal authority which can

* Com. v. 1, p. 250, 251.

resist or retard him, and yet, according to Mr. Sedgwick, to be thus absolute is in plain truth not to be absolute at all!

The remaining question has been already answered, by showing that the prerogative exerted may be a lawful prerogative, and yet be unlawfully exercised, in other words, abused; in which case although the law knows no tribunal which can take cognizance of it, yet it is not nor ought to be so far absolute as to prevent the resistance of the people should that abuse amount to a dissolution of the contract of society.

"The king has the sole power of making war and peace," says Sir W. Blackstone.* "For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power; and this right is given up not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign." Mr. Sedgwick, however, is of a different way of thinking,—'That this right is given up not only by individuals, but by the ENTIRE body of the people is not,' he says, 'intelligibly true.'—But the expression *intelligibly true*, which that gentleman uses is not to me, it must be confessed, *intelligible*—Either the position is true, or it is not. Certainly it may be intelligible, and not true; or, it may be true, and to some not intelligible. Does the gentleman employ the expression with the view (in case the position should be proved true) of sheltering himself under the word *intelligibly*, and of being enabled to say that if true he did not understand it? Conjecture is baffled in every attempt to guess what other purpose the word can answer. Perhaps, however, the introduction of that word may serve to display his caution, as it is not improbable that he may have ample occasion to apply it to the end which hath been hinted at above.

As to the observation of Sir W. Blackstone not being true,—I would ask Mr. Sedgwick, to what purpose an executive authority is ordained, if the right of making war and determining upon the occasions which shall call for

* Com. v. 1. p. 257.

an exercise of that right, is to remain in the entire body of the people? What possible means can they have of judging of the policy or impolicy of such a measure. The author of the 'Remarks' does not offer any arguments to show that the sovereign power and not the people at large has not or ought not to be invested with the sole power of making war. Nay, he seems to admit that it ought when he afterwards says,* 'Public expediency demands some one or more of the supreme officers, or authorities in a state, conversant with its interests, and acquainted with its resources, should be admitted to determine what are those wrongs which it behoves them to repel, and what those indignities to which they ought not to submit.' It is, however, added, that 'It is not that they have given up any native right they might have to make war; it is,' he says, 'that, on those awful questions which require to be discussed with forecast, forbearance, and moderation, which demand the deepest wisdom, and the most consummate prudence, those alone who are the best qualified should be called into council.†' We shall readily concede to Mr. Sedgwick, that the reason why the power of making war is vested in the sovereign power is not because the people have given up that right, for the learned commentator merely asserts the fact, that the right is so given up and is vested in the sovereign power of the state, and that in all states it is there vested. But the author of the 'Remarks' observes that—'When an *executive authority* is ordained, the right of repelling outward violence or of chastising aggression is not divested from the entire body of the people.' But what has this to do with the question inasmuch as repelling violence or chastising aggression, accurately speaking, is *defence*, not making war. Sir W. Blackstone does not deny that individuals may defend themselves if actually attacked. What his observations import is that they must not *begin the contest* without the previous sanction of the sovereign power. This is sufficiently clear from the expression itself, the right to *make war*; but if further evidence of the learned commentator's meaning were necessary, the same page will furnish it; for when speaking of the citizens who should com-

* Rem. p. 160.

† Ibid. p. 170.

mit hostilities without this previous sanction of the sovereign power, he calls them "*unauthorized volunteers in violence.*" If by 'the right of chastising aggression,' the gentleman means the right of attacking the subjects of another state and taking from them in return and satisfaction for the injuries which they have done to us, then that right is devested from the entire body of the people, and cannot be exercised before letters of marque and reprisal are issued.

Having said* that "the king is the person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law," Sir W. Blackstone afterwards adds,† "Hence also arises another branch of the prerogative, that of *pardon*ing offences; for it is reasonable that *he only who is injured should have the power of forgiving.*" Upon this last remark, with respect to the prerogative of pardoning, Mr. Sedgwick says, that‡ "Whatever the subtilties of legal fiction may teach, the king is not the individual injured, though for useful purposes he may in the eye of policy be so considered; if, therefore, the remission of punishment ought to rest with the person wronged, the principle on which this appropriation of the right of pardoning offences is here justified, militates directly against it; as it goes to prove that it ought, in justice, to be enjoyed, not by the supreme magistrate, but by the actual sufferer." The gentleman is most welcome to the whole and full benefit of his self-evident proposition, that the king is not the individual who is in point of fact injured, in other words, the *actual sufferer*; for, to be sure, if Thomas Nokes breaks an arm, or John Stiles a leg, the king sustains no bodily injury thereby. But when it is contended that the principle, "he who is injured should have the power of forgiving," goes to prove that it 'ought in justice to be enjoyed not by the supreme magistrate, but by the actual sufferer,' it is only necessary to ascertain to whom it is that allusion is made by the words—*he who is injured* as contained in that principle—Does the learned commentator speak of the person who is the actual sufferer or of the person who is injured in the eye of the law? Now it is impossible not to understand that he means the latter,

* Com. v. 1. p. 268. † Ibid. p. 268. 269. ‡ Rem. p. 173.

when immediately before, as a reason why the king ought to prosecute, he says, in so many words,—he “being the person injured *in the eye of the law*,” and then goes on to say “*hence* also arises the prerogative of pardoning offences, for it is reasonable that he only who is injured,” &c. As therefore we are bound to consider that the person whom the law regards as being injured, is the person alluded to by the learned commentator, the whole of the gentleman’s objection falls to the ground; for it consists merely in making this inference, that if the person injured should have this right of pardoning, then it follows that the actual sufferer ought to enjoy it, an inference which cannot be drawn, if the person *injured in the eye of the law* be the person alluded to in the premises.

That the king may well be looked upon by the law as being the person injured will appear when the subject is rightly understood, for all offences committed in the bosom of society, even where the actual sufferers are individuals, are offences against society—Society has taken upon itself the obligation of punishing such offences; but the public being an invisible body, hath delegated all its powers and rights in this respect, to one visible magistrate, the king; and therefore Sir W. Blackstone observes, all affronts to that power and breaches of those rights are immediately offences against him to whom they are so delegated by the public.

The author of the ‘Remarks’ in the next place makes a citation from Dr. Woodeson’s Systematical View of the Laws of England—‘Sir W. Blackstone styles him (the king), by an expression somewhat too loose, the ‘arbiter of commerce.’ There is nothing more in the citation which relates to the solidity of any remark by the learned commentator; and, with respect to the charge of the expression being too loose, it will be sufficient to say, that neither Dr. Woodeson nor Mr. Sedgwick has offered a single reason why he does not consider the term sufficiently full and comprehensive; nor has either of them ventured to suggest what other term could have been with more propriety substituted. When that is done it will be quite soon enough to defend the expression of Sir W. Blackstone, and in the mean time it is presumed that the judgment of the learned commentator will not much suffer in the reader’s estimation.

"As the quantity of precious metals increases," says Sir W. Blackstone, "that is, *the more of them there are extracted from the mine*, this universal medium or common sign will sink in value, and grow less precious. Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries; and the quantity is daily increasing. The consequence is that more money must be given now for the *same* commodity than was given a hundred years ago. And if any accident was to diminish the quantity of gold and silver, their value would proportionably rise." Now let us see in what manner Mr. Sedgwick endeavours to prove that no such consequence follows. He says,† that 'This inference must not be too readily admitted. In considering the causes which affect the price of commodities, regard must chiefly be had, not to the greater or less value of the precious metals, but to the high or low value of the commodities themselves.' But it is evident that in taking up the subject in his way the author of the 'Remarks' has gone beside the real question, which is not whether the price of particular commodities does not depend more upon the high or low value of those commodities than upon the greater or less value of specie; but the true question is, whether specie does not become depreciated in value, as its quantity increases; and whether it is not a consequence of that depreciation that more money must now be given for the *same* commodity than what was given formerly. That the price which any particular commodity bears, depends materially upon the high or low value of that commodity, and that that high or low value also materially depends upon its abundance or scarcity and the demand for it, is true; and Mr. Sedgwick is mistaken in supposing, as he seems to do in the following page,‡ that the contrary is meant; but the misfortune is that that gentleman's remark is not at all to the purpose, for what is it but saying that the price of commodities is affected by the circumstance of those commodities being of high or low value! In order to dispute Sir W. Blackstone's position, it must be contended either that the same commodities do not bear a greater price now than they did a century ago, and that too with respect to those articles which are not more scarce now in relation to the present demand for

* Com. v. l. p. 276, 277. † Rem. p. 174. ‡ Ib. p. 175.
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them than they formerly were in relation to the demand for them at such former period : or otherwise to admit the increase in price, and assign that increase to some other cause ; but, to say that this increase in price depends upon or is affected by the high or low value of the commodity, is not to advance anything satisfactory ; for there arises another question—what is the cause of such high or low value ? If it should be answered that the value depends upon its abundance or scarcity in relation to the demand, it would prove nothing, as it would not follow that because a greater price is given for an article of high value than for one of low value, therefore the sum to be given is not greater still in consequence of the increase in quantity of gold and silver. The price of meat, for instance, is much greater now than it was formerly, and yet it is not more scarce in proportion to the consumption and demand than it was a century ago. Supposing, in the year 1700, beef to have been at the price of 2d. per pound when the markets were well supplied. If it should become scarce, its value would experience an increase, and in the same year it might probably have been so high as 3d. So in the year 1800 it would perhaps generally be at 6d. but when scarce it might be worth 9d. : here the difference in the price in the same year, and the high and low value at the same time, is accounted for, by the sufficiency of or deficiency in the supply ; but this furnishes no reason why the *average* price of beef should in the year 1800 be treble to what it was in the year 1700 ; and what more satisfactory reason can be given for it than that as the price of commodities is greater or less, and are of high or low value, according as they are abundant or scarce, so the precious metals themselves sink in value, and grow less precious as they become more plentiful, and consequently that more must be given of those metals now than when they were scarcer, in exchange for the same commodity. The author of the ‘ Remarks’* however asserts, that ‘ the increase of gold and silver will *perhaps* be found upon a *close* examination to be the *effect* rather than the *cause* of the increased value of the article it is employed to circulate.’ Then what is the cause of that increased value or price of the article ? The gentleman does not hazard even a conjecture upon the subject : nor does he offer any reasons for

* Rem. p. 174.

thinking the increase of gold and silver to be the effect rather than the cause. Nay, it does not appear certain that he entertains such an opinion, for he says it will *perhaps* be found to be so upon a *close* examination. Has he not then *closely* examined the subject? Or, was the subject so investigated, but the fact did not either one way or other discover itself? If the former, did the gentleman deem it sufficient to combat the position of Blackstone by merely throwing out a loose surmise in distrust of its accuracy? If the latter, could he not have said after a close examination whether it is the cause or the effect? At least could he not have told us what his own opinion upon the subject was; or must we after all be compelled to infer that Mr. Sedgwick's examination was not productive of any result satisfactory to himself, and that he therefore contented himself with a supposition that *perhaps* his reader might upon a *close* examination find it so to be? It is, however, much to be feared that too great a compliment has been paid in point of penetration to the talents of his reader.

The author of the 'Remarks' proceeds to observe,* 'that the popular notion that as the quantity of the precious metals naturally increases with the increase of wealth, so their value diminishes as their quantity increases, has been shown by the intelligent author of the *Wealth of Nations* to be altogether groundless.' Now before I copy the passage which is cited from the book of Adam Smith, I must request the reader to observe, that this popular notion and the doctrine of Sir W. Blackstone are not one and the same thing, for his assertions do not import that that additional quantity of the precious metals which proceeds from the *increase of wealth* of the people has a tendency to lessen their value; on the contrary, his observations are restricted to the additional quantity that is *extracted from the mine*.—The more of them that are "extracted from the mine," says he,† this universal medium "will sink in value:" and it will be seen that the passage quoted by Mr. Sedgwick from the *Wealth of Nations*, instead of disproving, does directly corroborate the positions of the learned commentator." "Their quantity (that is, the quantity of precious metals, says Adam Smith) "may in-

* Rem. p. 134.

† See *supra*, p. 153.

“crease in any country from two different causes : either, “first, from the *increased abundance of the mines which supply it* ; or, secondly, from the increased wealth of the “people, from the increased produce of their annual labour, “*The first of these causes is, no doubt, necessarily connected with the diminution of the value of the precious metals* , “but the second is not.” Now here it is said, first, that the increase in quantity which proceeds from the increased abundance of the mines which supply it, is necessarily connected with the diminution of the value of the precious metals ; and this is precisely the doctrine of Sir W. Blackstone. It is also said, secondly, that the increase in quantity which proceeds from the increased wealth of the people is not necessarily connected with such diminution ; and Sir W. Blackstone, so far from asserting that it is, seems to have cautiously framed his observations in such a manner that there might be no possibility of its being supposed that he meant them to extend to that case, for he begins by saying, “as the quantity of precious metals “increases,” and then immediately restricts and explains the expression by adding—“that is, the more of them “there are extracted from the mine, &c.” Had it been the learned commentator’s wish that his observations should square with the above sentence in the *Wealth of Nations*, he could not have done it with more effect.

Mr. Sedgwick observes further, that* “of this vast aggregate of one thousand millions of bullion diffused over “Europe in the course of three centuries, the far greater “portion has been annihilated ; in coin, by friction and “accidental losses ; in plate, by wear and polishing ; much “must, likewise, have been consumed in gilding, and for “various other purposes. The variation in the price of “commodities, therefore, that gentleman concludes, so far “as it is affected by the mass of bullion flowing from the “the mines, will be regulated, not by the total of its “amount, but by the proportion which the waste and consumption bears to the quantity imported.” Now it is in fairness impossible to suppose Sir W. Blackstone’s meaning to be that the value of the precious metals depends upon the mass flowing from the mines without taking into consideration the loss which has taken place in the

quantity which before has been extracted. If a vessel laden with bullion should sink on its passage home, for instance, it would be absurd to say, that, according to the learned commentator's doctrine, the freight of that vessel, although it forms a part of what was extracted, would in any degree be productive of a diminution of the value of the precious metals. What he means is, *the quantity in circulation*, as appears from his saying that as that quantity is increased by more being extracted from the mine it sinks in value, and as any accident *diminishes the quantity* of gold and silver their value rises in proportion. Here then he takes into consideration the loss as well as the increase, and consequently must be understood to be speaking of the balance or quantity which may be from time to time in circulation. The case put by Sir W. Blackstone* serves to illustrate this farther: a horse that was formerly worth 10*l.* is now perhaps worth 20*l.* and by any failure of current specie may be reduced to what it was. The observation of the author of the 'Remarks' last taken notice of was therefore not necessary, as the learned commentator had himself said as much in effect; and indeed if he had not said so much, it could not have been believed that he had any other meaning.

Mr. Sedgwick admits that 'coin, like every thing valuable, is quantitative undoubtedly; but it does not,' he says, 'therefore follow, that the price of the wants and accommodations of life will vary uniformly with the augmentation or decrease of gold and silver. The same industry which increases the riches of a state, multiplies, at the same time, the objects upon which it may be expended.'† But, with respect to that increase in the quantity of gold and silver which is the result of industry, or, as it is said in the 'Wealth of Nations,' the produce of their annual labour, Sir W. Blackstone's observations do not extend.

There is such a contradiction in two of the following sentences of the 'Remarks' as to have baffled every effort of mine to reconcile them. He says in one of those sentences that 'It is likely that *the same* mass of specie which, when not sufficiently dispersed, has a tendency to heighten the price of manufactures, provisions, and labour, may, when

* Com. v. 1, p. 277.

† Rem. p. 176.

‘more extensively dispersed, have a directly opposite effect. Those articles which hitherto found a sure and high market, gradually sink in price when, instead of a confined class of wealthy purchasers, an innumerable body, but moderately rich, and therefore more economical, become the consumers.’* And in the other he states, ‘If the circulating medium in a nation hitherto amounted to fifty millions, and the sudden accession of one hundred and fifty millions, were’ (instead of being confined to three hundred opulent persons) ‘to be so generally and equally distributed, as to quadruplicate the monied property of every individual : in this case, from the suddenly increased demand, and other circumstances, the general rise in prices would be prodigious.’† Now it is in the first place asserted to be likely, that a mass of specie, when extensively dispersed, and when an innumerable body become the consumers, instead of a confined class of wealthy purchasers, ‘those articles which hitherto found a high market *will sink in price,*’ and in the very same page, that if the circulating medium should be increased by the general and equal distribution of one hundred and fifty millions so as to quadruplicate the monied property of every individual, ‘*the general rise in prices would be prodigious.*’ In both cases the gentleman hath supposed the circulating medium to be increased by the extensive dispersion and distribution of an additional mass of specie, and yet draws from that dispersion and distribution consequences diametrically opposite !

Mr. Sedgwick remarks‡ that ‘It is not the mere sum total of the money in a country that makes the necessities of life either cheaper or, dearer, but its diffusion among the bulk of the people.’ And no one surely will dispute the truth of this remark, for, unless in a state of circulation the sum total of the money of a state may as well be at the bottom of the sea, or have never been taken from the mine, as to any effect or influence it could possibly have upon articles of merchandize. And there is nothing in the Commentaries which raises any implication to the contrary.

The author of the ‘Remarks’ also says,|| ‘that of all merchandize, and of every thing which is the subject of

* Rem. p. 177. † Ibid. ‡ Ibid. || Ibid.

'commerce, the value is determined by the proportion which the supply bears to the demand.' This is also admitted, but, as already observed,* it does not account for the *increased price*, when the supply bears an *equal proportion* to the demand. It furnishes no reason why the same commodity should bear double or treble the price now to what it did formerly, although the demand is not more disproportionate to the supply now than it was at such former period; it cannot be true therefore that the price of commodities is regulated only by the request and supply, although assuredly it is so in part.

'In a kingdom, employing money as a measure of exchange,' says Mr. Sedgwick,† 'in which the industry of its inhabitants becomes more prolific in proportion as the precious metals become more abundant; the relative value of those metals to the produce of that industry, the demand continuing the same, must remain unaltered.' This is the doctrine of the *Wealth of Nations*, and is not disputed by Sir W. Blackstone.

The author of the 'Remarks' also says‡ that prices are affected by a variety of circumstances unconnected with the product of mines, or the portion of metallic currency.' Now it would be idle in me to contend that they are not; but does it follow that they are in *no degree* affected by the other alleged causes. Lord Kaines, some of whose observations,§ Mr. Sedgwick cites, confirms the doctrine of Sir W. Blackstone, when he says, that "if the demand and quantity of goods continue the same, the price will be in *proportion to the quantity of money*;" for to argue the question fairly it must be presumed that the supply bears the same proportion to the demand at each period. According to Hume¶ "the good policy of the magistrate consists in keeping the quantity of money still increasing, because by that means he keeps alive a spirit of industry in the nation and increases the stock of labour, in which consists all real power and riches." 'But,' says the author of the 'Remarks'|| 'if this writer's position, as supported by Sir W. Blackstone, is true, that "the high price

* Supra, p. 152. 154. † Rem. p. 178. ‡ Ibid. § Sketches of Man, vol. 1. and see Rem. p. 178. ¶ See his Essays, v. 1. p. 235. || Rem. p. 179.

"of commodities is a necessary consequence of the increase of gold and silver," "the magistrate who exerts himself to this end, however beneficent his intentions; and whatever temporary advantages may attend them, must eventually counteract his own efforts: he must impoverish and enfeeble the state." Here we are called upon once more to assert that the learned commentator's observations do not import that that increase in quantity of gold and silver which is connected with the increased industry and stock of labour has the effect of raising the price of commodities. But admitting that Hume and Blackstone cannot be both correct, are we to pay such comparatively little respect to the opinion of the latter as to conclude that he is in error merely from the variance between him and Hume?

Mr. Sedgwick concludes his chapter with the following observations. "The chief assignable causes of a rise or decline in the price of commodities seem to be the following:—A variation in the total product, in the quantity of money required to circulate it, or in the number or demand of the consumers. Should the demand for any particular commodity be lessened in an exact ratio to the decrease of its product, or *conversely* so its value will not be varied by any augmentation of the aggregate mass of gold and silver. An increase in the product, the sale and quantity remaining the same, will reduce the price; the contrary will of course enhance it. Should the sale extend itself, if the supply be increased in a still greater proportion, the price will be reduced.*" Upon all of which I have only to remark, in addition to what hath been already advanced, that at length Mr. Sedgwick admits that a variation in the quantity of money is one cause of the rise or decline of the price of commodities, which is all we contend for. Afterwards, however, when he comes to consider the relative influence of those causes, his conclusion amounts to a denial of his former admission; and that too in opposition to the remark of Lord Kaimes, which he has himself cited with approbation; for the gentleman supposes a case where the demand and product or quantity of the commodity decrease in an exact ratio; of course, the price after such decrease can-

* Rem. p. 180.

not be affected by any disproportion between the total product and the demand, for the best of all possible reasons, that no such disproportion can exist. The price will be the same then—as arising from any variation occasioned by the relative proportion between the supply and the demand—after such mutual decrease as before, for it is in that respect the same thing whether there is a supply of ten thousand of any given article and a demand of ten thousand, or a supply of five thousand and a demand of five thousand. But will not an increase in the quantity of gold and silver make any difference in the price in both cases? Mr. Sedgwick says* that ‘its value will *not* be varied by any augmentation of the aggregate mass of gold and silver.’ Now what says Lord Kaimes? “If the demand and quantity “of goods continue the same” (that is, in the same proportion to each other) “the price will be in proportion to the quantity of money.”†

* See the last page.

† Supra, p. 159. and Rem. p. 178.

CHAP. IX.

SIR W. Blackstone having observed,* that "All treasure found hidden in the earth or other private place belongs to the king; but that if the treasure be found in the sea, or upon the earth, it doth not belong to the king, but the finder, if no owner appears:" and having also, a few pages afterwards,† said that "Besides the particular reasons why the king should have the several revenues of royal fish, shipwrecks, treasure-trove, waifs, and estrays, there is also one general reason which holds for them all; and that is, because they are *bona vacantia* or goods in which no one else can claim a property,"—Mr. Sedgwick after Mr. Christian considers those observations inconsistent and irreconcilable.‡ But there obviously is not any inconsistency or contradiction in saying in one place, that treasure found in the sea or upon the earth doth not belong the king but to the finder; and in another, that there is a reason why the king should have them; for it is merely observing that the law gives it to one person, whilst there is a reason why another, should have it. Sir W. Blackstone does not intend, in the last sentence above cited, that the king is intitled to them; because they are *bona vacantia*, but that their being *bona vacantia* is a reason why he should have them. Indeed if he had said that the king could claim a title to them upon the ground of their being *bona vacantia*, surely every one must have understood him as speaking with respect to treasure trove, of treasure found hidden in the earth only, and not of treasure found in the sea, or upon the earth, according to the distinction which he himself had before taken.

There cannot be any difficulty in supposing a sufficient reason why *bona vacantia* should belong to the crown. It has been with us considered a maxim of sound policy, to

* Com. v. 1. p. 295. † Ibid. p. 298. ‡ Rem. p. 181, and Bl. Com. p. 298. in notis. Mr. Christ. edit.

assign to every thing capable of ownership a legal and determinate owner. In pursuance of this policy, and to prevent disturbances and quarrels between individuals contending for the first occupancy, the law of England has vested the things themselves in the sovereign of the state. Hence the reason why forests and other waste grounds, wrecks, estrays, &c. are held to belong to the king.* Now with respect to treasure trove in the sea, or upon the ground, although the law allots them to the fortunate finder, still there is the same reason that the king should have them in common with other *bona vacantia*. To say that *bona vacantia* belong to the finder in a state of society *jure naturali* merely is an absurdity, and after what has been advanced, it will perhaps be thought that with regard to all *bona vacantia* (except where the law hath given them to the finder) the general rule is, that they belong to the king, and not the reverse, as Mr. Christian and Mr. Sedgwick have asserted.

"The true reason and only substantial ground of any forfeiture for crimes," says Sir W. Blackstone,† "consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him." But the author of the 'Remarks' attempts to prove the inaccuracy of those passages in the Commentaries by observing,‡ that, "That property must have been known, and its claim recognized, antecedently to the appearance of those laws by which it is regulated and preserved, is sufficiently apparent. The appointment of a guard evidently supposes the substantial existence of the thing to be protected; the laws, therefore, cannot with propriety be said to have primarily assigned that right which they were expressly ordained to assure." Now here Mr. Sedgwick sets out

* 2 Bl. Com. p. 14. . † Com. v. 1. p. 299. ‡ Rem. p. 122.

with assuming the only thing which he was called upon to substantiate by proof; for in order to shew that property was not assigned by society, he takes it for granted to be sufficiently apparent that it was known and its claim admitted previously to the appearance of the laws which relate to it; but he has omitted to favour his readers with any reasons which render his position in their sight sufficiently apparent, although he intended perhaps that what he has said about the appointment of a guard should be so considered. The gentleman's opinion seems to be, that as society was instituted, amongst other purposes, as a guard to protect individuals in the peaceable enjoyment of their property, there arises an inference that property substantially existed before. Does then Mr. Sedgwick really believe that the modifications under which property is at present found, the method of conserving it in the present owner and of translating it from man to man existed antecedently to the laws of society, for that is what the learned commentator means by property? The gentleman will not venture to contend that property, *taken in that sense*, is not a civil right, and if he cannot, it is plain that all civil rights were assigned by the laws of society.

That individuals acquired a temporary property in things before the institution of civil society, that is, such a property as existed so long as, and no longer than, the actual possession continued, is admitted; but there they were usufructuaries merely; and with respect to their claim to that property being *recognized*, there was no power to prevent the incroachments of stronger and oppressive individuals. Society was instituted at a period when the utility of having a more permanent interest in things, as well as the necessity of combining together for the general protection of the whole, was apparent. However, the exclusive right to property is unquestionably derived from society, and so is the protection afforded in the quiet enjoyment of it, and that right may well be said to have been assigned by the laws. Supposing that upon the first foundation of civil society any individual possessed a temporary property in a particular spot of ground, and that under the laws of such society he acquired a permanent and exclusive dominion in it, it certainly would be correct to say that the property so modified was assigned by society—that the exclusive right

to a permanent dominion in that property was a civil right.

'To consider all property as allotted to its possessor,' continues Mr. Sedgwick,* 'by way of equivalent for that portion of liberty which they were compelled to relinquish on their first incorporation into political community; and to justify, on this ground, the confiscation of the property thus bestowed, is to assume a principle too subtle and recondite to be understood by many.' But this is a strange way of reasoning, for whoever before heard, that because a principle is too subtle and recondite to be understood by the ignorant many, admitting the fact to be so, it hence follows that the principle is not sound? The gentleman, however adds,† that 'perhaps it is too equivocal to be satisfactory even to the few by whom it may be understood.' We might content ourselves with saying in reply to him, that *perhaps* it is not. An argument which consists of an assertion, that the principle to be proved erroneous is '*perhaps* too equivocal to be satisfactory,' may be distinguished for its novelty; but certainly is not less remarkable for its inanity. It was for Mr. Sedgwick to have offered reasons why it was not satisfactory. He has doubtless weighed in his mind the subject upon which he has written: did no reasons occur to him, or were they of such an equivocal nature that he could not venture to exhibit them? That he is one of the many who have found the principle too subtle to be understood, cannot be supposed; and the principle itself therefore acquires strength from the circumstance that one capable of understanding it, and at the same time willing to dispute it, was unable to offer any reasoning against it.

The tendency of the principle is, in the next place, objected to, for Mr. Sedgwick says‡ that—the language, to which we have been so long and so much accustomed, of a right of resumption in the state, tends to establish a principle fundamentally false, and which leads to consequences pregnant with the darkest fraud and most tyrannous injustice. 'The state,' it is added, 'or those who assume to direct in its name, and to act on its behalf, may, under the pretext of modifying this its boon of a

* Rem. p. 132.

† Ibid.

‡ Ibid. p. 132.

‘right to property, enforce such measures of restraint and requisition on individual estates and possessions, as could scarcely enter into the conjecture of those who had not witnessed the atrocious disposessions, confiscations, and proscriptions; which in our times have convulsed the system of property in a neighbouring state.’ Now to what is it that the gentleman’s argument against the doctrine of a right of resumption in the state amounts? Why, truly, that in a neighbouring state various atrocious disposessions, confiscations, and proscriptions were committed, this principle having been made use of as a pretext, “*argal*,” the principle must be fundamentally false. So religion, so liberty have been made a cloak for proceedings the most unjustifiable; but are *true* religion and liberty, on account of such abuses, the less to be revered? It is indeed an empty mode of reasoning; to say the least of it, to argue from an abuse of a principle against the principle itself.

The doctrine of the learned commentator is, that the right to property, such as it at present exists, is derived from society; and that when any member violates the fundamental contract of his association by breaking the laws of society, that right is forfeited, and the state may then justly resume that portion of property, or any part of it. The laws have defined what crimes shall occasion a forfeiture of the criminal’s property; and it is only where such crimes have been committed that there arises any right of resumption in the state: can it then be truly asserted that this right of resumption in the state tends to the establishment of any *principle* leading to atrocious disposessions, and other acts of tyrannous injustice, when it can be only justly and lawfully exercised in those cases where the culprit has himself been guilty of some atrocity? And with respect to any unjust or illegal acts being liable to be committed under the pretext of such a right existing, it furnishes no argument against the right itself, or the lawful and legal exercise of it. The atrocious acts alluded to were not the consequences of the principle, but of the wickedness of those who availed themselves of it as a pretext. If that had been wanting, they would have acted upon some other. In truth Mr. Sedgwick afterwards seems to admit* that

* Rem. p. 183.

'the integrity of the government, or the will to enforce the equal dispensation of justice, must cease to exist,' before any conclusions unfavourable to the fair and secure enjoyment of property may be deduced from the principle; and that under a mild and equitable government property may be substantially secured to its rightful occupant, whether or not it be admitted that all property is concessionary on the part of the state.* Why when a government becomes corrupt and disinclined to the dispensation of justice the most just and equitable rules often have been and will continue to be perverted to answer its iniquitous ends.

The author of the 'Remarks, after saying, * that—'It seems to be very generally assumed, that, in the first ages of the world, all ideas of a separate and exclusive property were unknown,' proceeds to dispute the validity as well of that doctrine, as that all property is derived from the state. His arguments, or at least the substance of them, shall all be taken notice of in the order in which they occur. 'In the northern regions, the savage hunter would naturally regard his prey, or whatever of food, or clothing, or ornament he might acquire, as belonging solely to himself, and that his fellows would not consider themselves entitled to participate his acquisitions.† Now admitting this, it goes no way towards proving that they had ideas of a separate and exclusive ownership in things capable of a permanent dominion. It is allowed by all, that as long as the possession of the thing lasted, the possessor was entitled to it; but the question is, whether, when that possession no longer continued, it would not be again as much open to the rightful occupation of others as it was when first occupied by the late possessor.

'When history informs us,' continues Mr. Sedgwick, 'a rude and vagrant people, such, for instance, as were the ancient Scythians, feeding their herds on what tract of ground they found unoccupied, and presently vacating and leaving it again in common, we must not hence conclude that they had no idea of a property distinct from possession. We can only infer, that they were too restless or too indolent to apply themselves to the irksome

* Rem. p. 184.

† Ibid. p. 185.

‡ Ibid.

* tasks of agriculture. But the gentleman gives us no reason for supposing that they *had* any such idea. The inference from their mode of life—that of wandering about from place to place—certainly is, that they did not entertain any notion of a property distinct from the possession. The gentleman also hath omitted to inform us upon what principle of natural right such a claim could have been supported. Supposing one tribe to have been in possession of a particular spot of ground, and when its produce was consumed, to have left that spot and gone in search of others—Another tribe, when the herbage of the abandoned spot becomes renovated, takes possession of it; where can be the right in the first tribe to dispossess the second upon the ground of a separate and exclusive ownership? What right could they have had but what possession gave them, and the second plainly had the same right to that possession when they found it unpossessed? Neither is it to be inferred from the circumstance that the Scythians ‘punished theft and pillage,’ that they had any idea of property distinct from the possession, for it was the taking away of the things so possessed that was punished.

‘In more southern latitudes, indeed,’ continues Mr. Sedgwick,* ‘where the spontaneous fertility of a mellow and unworn soil precluded the necessity of cultivation; there would, of course, be but little solicitude about its ‘appropriation.’ From which one would be induced to suppose that the gentleman had before contended, with respect to a soil requiring cultivation, that its inhabitants had been solicitous about its appropriation or had entertained some ideas upon the subject; but none of his preceding observations respecting ‘savage hunters in northern regions,’ and the ‘ancient Scythians’ apply to a property in any thing but the fruit of labour and the produce of the soil.

‘The invention of husbandry,† it is said, ‘would come attended with fences, and land-marks, and rings, and enclosures, and all the petty contrivances by which industry empales itself against the encroachments of fraud. But all this would soon be found inadequate to the end. The simple would oftentimes be dispossessed by

* Rem. p. 185.

† Ibid. p. 185, 186.

'the subtle, and the feeble dispossessed by the strong: 'the frequency of such depredations, would suggest precautions against their renewal; the most obvious would be 'the confederacy of neighbouring proprietaries for their 'common protection and defence.' But the gentleman has forgot to show that the art of husbandry was practised, and those land-marks, &c. made *before* the institution of society, as well as that previously to that period, individuals could acquire a permanent interest in the soil: but even admitting agriculture to have been in use, yet the mere tilling of the ground would not have created any right to a permanent property in the soil; although it would undoubtedly give to the cultivator a right to the crop which would be the fruit of his labour, and to the future produce of the soil as long as he continued in possession. If the earth was the gift of God to man upon his creation, it was common to all, and the right to a particular part consequently could not be a natural right, and must therefore spring from society.* Society therefore must have been the parent of property, distinct from possession, and not the mere protector of a right previously existing. Indeed upon Mr. Sedgwick's own view of the subject, a contract must have existed; although, with respect to the confederacy of neighbouring proprietaries, for their common protection and defence, he adds,† that 'for this no compact, no 'sanction of positive law would be required: the interest 'of each would give bond for the fidelity of all.' Now is it not palpable that such confederacy is a compact? If a number of individuals league together in order to obtain any given end, will it be said that there is no compact, no agreement between them? Ay, but there is no positive law. Does not, however, such a confederacy create certain duties and obligations? Is not each individual bound, in consequence of such confederacy, to abstain from trespassing upon the possessions of his neighbour? Is it not his duty to stand forward in defence of those possessions when attacked? And if such be the case, it is not correct to say, that no compact, no sanction of positive law would be required. The notion that 'the interest of 'each would give bond for the fidelity of all,' is chimerical; for supposing that by superior industry and cultiva-

* Vide *supra*, p. 91.

† Rem. p. 186.

tion the possessions of one become more fertile than those of his neighbours—here interest would strongly tempt a more robust proprietor to usurp the possessions of the other, particularly as there existed no compact, no sanction of positive law (which the gentleman asserts) between the persons confederated together. Again:—If men in that state were so immaculate as not to be seduced to acts of injustice by their interest, whence would arise the necessity of such a confederacy?

The author of the 'Remarks' then concludes the 9th chapter of his work with some observations upon deodands, not, however, questioning the accuracy of the learned commentator's remarks upon the same subject, and consequently it is not necessary for me, in the pursuit of the plan which I have chalked out, to take them at all into consideration.

It would be wrong, however, to pass over in silence a note* upon the subject which has been just now dismissed, in which Mr. Sedgwick's intention is to correct what he deems a verbal inaccuracy in the Commentaries. But it will, I conceive, be seen to be one of the most extraordinary corrections that was ever made by misconception and error upon sound observation and truth. 'I take the present opportunity of correcting' (says he) 'a verbal inaccuracy, which we cannot but be surprized to find in every impression of the Commentaries, and which even stands unamended in the late very useful edition by Dr. Christian. To this account of the primitive state of property,' (the account in the Commentaries) 'it is subjoined,' says Mr. Sedgwick, "Not that this *communio* of goods seems ever to have been applicable even in the earliest ages to aught but the *substance* of the thing; nor could it be extended to the *use* of it.†" 'It is obvious,' adds the same gentleman, 'that the truth meant to be conveyed is exactly the reverse of the statement; it should stand thus—"to aught but the *use* of the thing; nor could it be extended to the *substance* of it." Now the statement itself is perfectly correct as it stands in the pages of the Commentaries. The learned commentator has illustrated his doctrine by availing himself of the expressions in which the same ideas were clothed by Cicero, who com-

* See Rem p. 184. † Bl. Com. v. 2. ch. 1, p. 3.

compares the world to a great theatre which is common to the public, and yet the place which any man has taken is for the time his own. Thus the earth in one case is in common to all mankind, as the theatre in the other case is common to the whole public; and the communion of goods therefore is in respect of the earth and theatre, in other words, the substance. When any individual was in the occupation of any particular spot of that earth, or of any particular place which he had taken in that theatre, he had a right to the temporary use or possession of that spot and place so long as he continued the possession of it without any disturbance by other persons. The communion of goods consequently could not be extended to the use or possession of that spot or place when so occupied. But if Mr. Sedgwick's improvement should be adopted, it would follow that although a person was in possession of such a spot of ground or place in a theatre, yet it was competent to every other person to obtain the use of it also during the time of such possessor having the use and occupation; for, according to his doctrine the communion of goods was applicable to the use of the thing. Again, if we are to reverse the statement of the learned commentator, as the gentleman would have us do, then this communion of goods did not extend to the substance of the thing, but to the use of it only, whilst the substance itself, but not the use, exclusively belonged to the particular occupier.* Then see the absurdity of this notion—all men are equally entitled to the use of that substance which substance is the exclusive right of the individual actually in possession of it; or otherwise all men have a right to the use and occupation of things, the substance of which belongs not to man either collectively or individually!

In support of his objection, however, Mr. Sedgwick adds,† that the statement, as reversed by him, 'is conformable with what the learned writer presently afterwards tells us, "that when mankind increased in number, "craft, and ambition, it became necessary to entertain "conceptions of *more permanent dominion*, and to appropriate to *individuals* not the immediate use only, but "the *very substance* of the thing to be used.‡" This

* Com. ubi supra. † See the note referred to. ‡ Com. v. 2, c. 1. p. 4.

sentence, however, makes directly against the author of the 'Remarks,' and points out the accuracy of the other passages in the Commentaries to which he has taken an exception; for it is manifest from the expression of its having become "necessary to appropriate to individuals" also not the *use only* but the very substance of the thing," that previously thereto, it was the use that had been appropriated to individuals, and that the substance had not; and surely it requires no great exertion of mental strength to draw the inference that there could not have been a communion of goods in the use so appropriated to an individual, as well as that to no individual was any part of the substance so appropriated.

CHAP. X.

ADVERTING to the national debt and the capital of which it consists, Sir W. Blackstone observes,* that “by this means the quantity of property in the kingdom is greatly increased in idea, compared with former times; yet if we coolly consider it, not at all increased in reality. We may boast of large fortunes, and quantities of money in the funds. But where does this money exist? It exists only in name, in paper, in public faith, in parliamentary security: and that is undoubtedly sufficient for the creditors of the public to rely on. But then what is the pledge which the public faith has pawned for the security of these debts? The land, the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these therefore, and these only the property of the public creditor does really and intrinsically exist: and of course the land, the trade, and the personal industry of individuals, are diminished in their true value just so much as they are pledged to answer.” But Mr. Sedgwick asserts,† that—‘To affirm of the property in the public funds, that it exists, only *in name*, is to say, in other words, that it has no existence at all.’ Now Sir W. Blackstone does not mean to say that the property of the public creditor is nominal only, and has no existence at all, for he states afterwards that it is *secured* upon the land, the trade, and the personal industry of the subject; but that as to any kind of property which it can be supposed to constitute independent of and as making an addition to that land, trade, and personal industry, its existence is in name, &c. only; for his position is that *the quantity of property is not increased in reality* by the addition of the funded national debt. That although we may boast of large fortunes in the funds, yet those capitals make no *increase* to the actual property of the kingdom. In former times, before recourse was had to the funding system, the land, the trade, and personal industry

* Com. v. 1, p. 327.

† Rem. p. 193, 194.

of individuals constituted the property of the kingdom ; and now that a public debt hath been contracted and money borrowed by the state upon the security of that property, it seems to me indisputable that that debt (and in it alone does all funded property consist) cannot possibly be said to increase the property of the kingdom, and for this plain reason, that when paid it must arise out of that land, trade, and personal industry, and consequently the land, the trade, and personal industry will decrease in value in the same ratio that the taxes charged upon it increase. All fortunes in the funds therefore, exist only in idea as to any existence *independent* of the land, trade, and personal industry ; or as to any *addition* which they can be supposed to make to the quantity of property in the kingdom.

But Mr. Sedgwick says* that Sir W. Blackstone is 'at variance with himself : if the *land*, and *trade*, and *personal industry*, of the kingdom (a property which is allowed to have a *real* and *intrinsic* existence) are pledged for the security of its debt, the property thus secured cannot at the *same time* justly be said to exist in name and in *paper only*.' If the true sense and import of the learned commentator's observations had been understood, no such variance would have been imputed to him ; for, as it hath been before observed, he does not deny that the property of the public creditor is substantial. All that he means is, that as to any existence *independent of* and *as making an addition* to the property of the kingdom, which consists of the land, the trade, and personal industry of individuals it is merely ideal : and there can be no contradiction in saying in this sense that it exists in name only, and afterwards that it really and intrinsically exists in that land, trade, and personal industry ; for the whole drift of his reasoning is to show that its only *real* existence is in that land, &c. and not in the public funds, as constituting a property distinct from it ; the whole being intended to make good his first position, that " the quantity of property in the kingdom is greatly increased in idea compared with former times, yet not at all increased in reality."

The author of the 'Remarks' observes,† that because

* Rem. p. 194.

† Ibid. p. 195.

‘ the property of the public creditor does really and intrinsically exist in the land, trade, and personal industry ; that therefore *these are of course diminished in their true value, just as much as they are pledged to answer,* is by no means a necessary consequence. If,’ says he, ‘ the value of the land is augmented, and that trade, inland and foreign, which gives employment to personal industry, increases (as actually and in fact it has done) with the increased amount of the sum for which they are security, their true value can in no way be diminished ; and should it exceed this proportion, that value, it is clear, may be enhanced.’ The reasoning of Mr. Sedgwick upon this subject, then, amounts to this— If a man having an estate value 5,000l. borrows 2,500l. upon it, and then from some cause or other the estate becomes intrinsically worth 2,500l. more, it would be clear that the value of the estate to the owner would not be diminished by reason of this existing charge of 2,500l. upon it. But who does not see, that although from some other causes (for he does not show how the debt itself upon the estate has a tendency to increase its value to the amount of that debt) the value of the estate over and above all charges continues to be the same as when it was pledged, viz. 5,000l. that but for that pledge its value to the owner would be 7,500l. for it is idle to suppose that the trade of the country increases as its public debt increases and as the consequence of that debt, especially when it is considered that the money borrowed is employed to defray the expences of wars in which trade and commerce invariably suffer ; and therefore I must beg leave to observe, that although I have just now supposed the capital of the kingdom to increase so as to become after the charges upon it equal to what it previously was, yet it was only for the purpose of pointing out the weakness of the gentleman’s observation, and not in consequence of my entertaining any belief that such is really the fact. It would be a very gratifying piece of intelligence if the author of the ‘ Remarks’ could make it appear that the surplus of the gross produce of the land, the trade, and the personal labour of individuals after the deduction made by interest of the vast public debt charged upon them considered in all its various bearings, is equal now in comparative value to the gross amount of their produce at the period when the first charges were made upon them. It would tend greatly to recon-

cile the people to the heavy taxes which are imposed upon them, if upon some newly invented principle of arithmetical calculation it could be demonstrated, that although it is obvious that the property of every individual in some way or other is considerably *diminished* on account of the taxes to which that debt gives rise, yet that the capital of the country which must be made up of the property of those very individuals, is notwithstanding by means of that very debt increased. That the trade of the country has increased is not denied, but then it is futile to attribute that increase to our national incumbrances. That a certain proportion of debt is salutary may also be admitted; but it is absurd to suppose that the capital of the country has been augmented in consequence of the public burthens in the proportion that that vast load of debt has accumulated.

"The creditor's property exists," says Sir W. Blackstone,* "in the demand which he has upon the debtor, and no where else; and the debtor is only a trustee to his creditor for one half of the value of his income. In short, the property of a creditor of the public consists in a certain portion of the national taxes: by how much therefore he is the richer by so much the nation which pays these taxes is the poorer." In commenting upon these observations, the author of the 'Remarks' exhibits a specimen of hypercriticism: 'the property of the creditor,' says he,† 'consists not *in the demand* which he has upon his creditor (debtor) *but in the ability* of the debtor to satisfy that demand; for should the latter become insolvent, the *demand* of the former would still continue; but we could not say so much of his *property*.' Now it certainly must be allowed that a debt cannot be said to constitute any property unless the debtor has ability to pay; but Sir W. Blackstone, in stating wherein the creditor's PROPERTY consists, assumes that ability to pay, for without it there would not, upon the strength of the gentleman's own argument, be any property; and where the creditor's property has any existence at all, it is in the demand which he has upon his debtor.

Mr. Sedgwick remarks also that‡ 'there is one circum-

* Com. v. 1. p. 328.

† Rem. p. 197.

‡ Ibid.

stance which very materially distinguishes the condition of the private mortgagor from that of a person taxed towards paying the interest of a public loan: the one is compelled to compensate, by economy, this deduction from his gross rental; whereas the other, should the commodities in which he deals be burthened with an heavy additional duty, immediately advances its price, and by that operation brings his profit to a level with what it was before such duty was imposed. If then, he concludes, the whole mass of *taxed* commodities be raised in like manner, as in the natural course of things they must and will, the burthen loses its weight.* But what becomes of the *consumer* all this while? It seems to have been quite out of the gentleman's reflection that a great body of consumers do not traffic at all; that others do not traffic in any commodities which are taxed; and also that a great many of the taxes are not laid upon articles of traffic. But this notion of his, is in *no* respect sound; for supposing that the tradesman is enabled to raise the price of his commodity so taxed, high enough for him to derive the same clear profit from its sale that he had been accustom'd to do, it is obvious that other taxed commodities in which he does not deal will be raised in price in like manner, and that in the character of a consumer of those commodities, he will pay an increased price in consequence of the taxes which he will not be able to reimburse himself. Nay, further, it is also plain, with respect to the taxed articles themselves, in which he himself deals, that he will also suffer by the increase in price so far as he is a consumer of them, but this point will be more at large considered a few pages below.*

'Another important difference between the creditor of the state and the private creditor consists in this,' according to Mr. Sedgwick, 'that the cash received by the government from the former, is the far greater part returned again into the common stream of circulation, and the sums which in one year is, (are) paid by the public in the shape of taxes, is (are) received again in the next year in the wages of that labour upon the produce of which those sums are expended; thus the

* *Infra* p. 185, 186.

* general reproduction is vivified and invigorated: But the interest received by B. the private creditor, does not flow back into the mass of A.'s capital.† Now the gentleman hath admitted already that the tendency of a tax upon any commodity is to increase the price of that commodity, consequently the money which returns into circulation does not at all tend to increase the produce of labour; for as a much larger capital is required to circulate the same articles, of course a great part of what returns will be called for in that way; and besides that, the money borrowed is taken out of the stream of circulation in the first place, and when it is returned, even supposing that the whole should be returned, that stream cannot be thereby swelled to a greater extent than it was before a part of it was taken away. Suppose the annual produce of a state to be 10 millions, and that the government has occasion to borrow 20 millions, the public will have to pay one million we will suppose in taxes: true, says Mr. Sedgwick, but then great part of those twenty millions will return into the common stream of circulation, and the public will in the next year receive that million in the increased produce which has been occasioned by that circulation, but the gentleman does not seem to take at all in this place into his consideration, that those twenty millions were in circulation before, although in the very next page he admits that they must have existed in the hands of the lender, and that so far from supposing that their produce will be increased by their being taken out of circulation and returned again, it is manifest that there must be a considerable falling off, as well because a part is sunk in foreign payments, as because a larger capital is required to circulate the same commodities by reason of their having increased in price; for the author of the 'Remarks' confines his argument to the *quantity actually borrowed*, and does not at all advert to the circumstance, that the debt itself creates a new species of currency, and so causes an increase of circulation as Sir W. Blackstone observes in the passage to which we now proceed.

"The only advantage," says the learned commentator "that can result to a nation from public debts, is the in-

† Rem. p. 198.

“crease of circulation by multiplying the cash of the kingdom, and creating a new species of currency, assignable at any time and in any quantity; always therefore ready to be employed in any beneficial undertaking, by means of this its transferable quality, and yet producing some profit even when it lies idle and unemployed.”* But Mr. Sedgwick remarks,† upon these observations, that ‘It is not very conspicuous that the public debt multiplies the cash of the kingdom;’ that ‘the cash borrowed, it is clear, must previously have subsisted in the hands of the lender;’ and other remarks to the same effect. The meaning of the learned commentator has, however, been misconceived; for it is not meant, that the cash borrowed, or the circulation of it, is increased by its being so borrowed; but, on the contrary, that it is multiplied in this way—the money borrowed returns again, at least some part of it returns, into the channels of circulation, whilst the *principal debt itself* is converted into a *new species of property*, (viz) the public stocks; thereby multiplying the cash of the kingdom, and which becoming also current, increases circulation.

The author of the ‘Remarks’ continues—‡ ‘Neither can it be truly affirmed of this new species of property—that it produces a profit even while it lies idle and unemployed: the moment it is made to produce a profit whether by lending on mortgage to an individual, or to the state, it must from that instant cease to be idle, whatever be the mode in which it is employed, it still must be employed, or it could not beget that increase which makes it profitable.’ This is one of those petty objections which it is not too much to say are quite unworthy of Mr. Sedgwick’s talents, and which I have been in doubt whether I ought not to pass over without notice. Sir W. Blackstone had stated, that the new species of currency, in other terms, a man’s property in the funds, was always “ready to be employed in any beneficial undertaking;” and when he says immediately afterwards, that it “produces some profit even when it lies idle and unemployed,” he may well be understood to mean not *absolutely* idle and unemployed, but comparatively so; that is, in comparison to what it would be if

* Com. v. 1. p. 328. † Rem. p. 199. ‡ Ibid.

employed in any trade or any other beneficial *undertaking*. Surely there can be no inaccuracy in saying, that that capital lies idle and unemployed which is out at interest, in comparison with the capital of another which is employed in a state of circulation in any beneficial *undertaking*. But without speaking comparatively—a man's property may well be said to be idle and unemployed when it is not embarked in any undertaking which puts it in a state of circulation, although a consideration is given for it by the person to whom it is entrusted. 'But this, by the way,' adds Mr. Sedgwick,* 'is not the sole advantage resulting from a public debt: were there no public funds, the ordinary rate of interest would be so low, that none but persons of very ample fortune could live upon the interests to be gotten from it.' Is this indeed a consequence to be dreaded? Does not the lowness of interest suppose a superabundance of general wealth? What is the necessary consequence of a man's being unable to live upon the interest of his capital but this, that he would embark that capital in trade and in agriculture, either on his sole account or otherwise in conjunction with others, in the prospect that it would become more productive by being so employed. It is true that it would lessen the means of making beggars of the many in order to enrich the few, but the general opulence of the state would be the consequence.

'But for the public debt, or, what is the same thing, the public stocks, that numerous description of persons, whose industry might procure to them a revenue greater than their rational wants might require, and who would naturally be desirous to amass such an independence as might exempt themselves from the distresses commonly attendant on indigent old age or to secure to their families a provision which might leave them above the necessity of drudging at those low healthless occupations, which blast the prime of manhood, and debase our common nature; such persons would have no resource but to pile up pound upon pound, the sequestered savings of skilfulness and labour, which, while it withheld from the general commerce that food on which it subsists, would remain to the hoarder.'

* Rem. p. 199.

' dormant, unprolific, unserviceable heap.*' This is somewhat overcharged. *How* would it follow from a discouragement existing in the way of laying out money at interest in the funds that such money would in consequence be withheld from the general commerce? The gentleman has not favoured us with his reasons, but I will venture to assert that the reverse would most probably be the case; that if there were no such funds wherein to invest money, it would be laid out in commerce or agriculture rather than it should continue unproductive. Here would be a resource besides that of piling pound upon pound. The non-existence of the public debt would not prevent men from amassing an independence, or how were independent fortunes amassed before the funding system was resorted to? Mr. Sedgwick admits it to be true that 'such persons, (as now invest the surplus of their revenue in the funds) might lend it to individuals: numbers might be found desirous of embarking in undertakings to which their own capitals were not adequate, or whose speculations or necessities might compel them to become borrowers.†' Now this would evidently be to promote the interests of the state. But he, however, supposes that 'the rate of interest would be so low (occasioned by the vast disproportion of those who had money to lend to those who might be willing to subject themselves to the inconvenience of borrowing) as not sufficiently to compensate the hazard to the lender.‡' The gentleman certainly does presume not a little upon the patience of his readers when he lays before them such observations as these. Who could have supposed that the advantages of the national debt would have been attempted to be supported upon the ground, that were there not any such debt there would be a vast disproportion of those who would have money to lend over those who would have occasion to borrow! In doing so the gentleman has advanced a strong proof that the tendency of that debt is to increase the number of the necessitous and to lessen that of the opulent: and these things forsooth we are invited to regard as advantages! Further—the gentleman supposes that if it were not for the funds, and if the money now invested in them were lent to individuals, the

* Rem. p. 200.

† Ibid.

‡ Ibid.

rate of interest would be so low as not to afford a sufficient compensation to the lender, and yet notwithstanding this he actually does assert* a few pages below, that were the funding system annihilated the interest would probably be higher !

It is very probable also that some part of this redundant capital might be employed in the improvement of agriculture, manufactures, and the arts ; but in Mr. Sedgwick's opinion this latter supposition is mere illusion. We will follow him in the reasons which he has given and endeavour to ascertain their force. ' Such improvements (he says) are gradual and progressive.' True, they are so ; but would not such an appropriation of surplus capital work gradually and progressively those improvements ? ' Neither the arts, nor manufactures, nor agriculture are at all times in a condition to receive the sums that might be expended upon them.' The gentleman, however, omits to show that the period of which we are speaking is that period in which they are not in such condition : but it is obvious that whenever there is (and when has there not been) room for such improvements in agriculture, manufactures, and the arts, at that time agriculture and manufactures, and the arts are in a condition to receive the sums which might be expended with a view to their improvement. Indeed the gentleman himself seems to suspect that he may not sufficiently have established his position, for he adds, ' even were the fact otherwise, still the time and talents of the owners of such capitals, it may be, are otherwise appropriated.' And it may be they are not. If they are, what is to prevent their capitals to be laid out so as to admit of their time and talents being devoted to it ?

' Traders, mechanics and others,' it is also said,† ' would be discouraged from accumulating money, when besides other disadvantages they could not put it out at interest without risk.' If they could not even put it out at interest at all, it is an additional reason why they should be more frugal, in order to provide for the wants of old age ; for if the money laid aside do not increase it would enter into every one's calculation that he

* Rem. p. 214, 215 ; and see the remarks upon that assertion *infra*.

† Rem. p. 201.

ought regularly to lay aside more in order to provide the sum required. Frugality therefore, instead of its 'ceasing to be cultivated,' would be cultivated in a greater degree. The public debt is also said* to be 'somewhat of a common bond of union and fidelity in the hour of intestine convulsion, &c.' But to those who have property it would not be more a bond of union than property of any other description; and as to those persons who have no property or substance, but are obliged nevertheless to pay heavy taxes on account of this national debt, what kind of bond of union would the national debt create as between them!

'Another important advantage attending the institution of the public funds, is' (according to Mr. Sedgwick)† 'their tendency to facilitate the attainment and circulation of landed property by keeping down its price to the level of ordinary purchasers,' for that gentleman's idea is, 'that were there no funded stocks wherein persons holding a surplus revenue might employ it, every one would be anxious to purchase land, which would occasion such an increase in the price as to place it beyond the attainment of persons of moderate fortune; that the increase in the price of land would augment in proportion the price of the produce of the land; and as manufactured produce insensibly adjusts itself to that of agricultural produce, a general augmentation of prices would take place.' Now it is not necessary to dispute these positions in order to make good our objections to the conclusion which the gentleman has attempted to draw from them, that is, that these consequences of the public debt are an important advantage to the nation: for with respect to persons of moderate fortune not being able to purchase land, it has been already observed that there are other purposes to which it might be applied; and that being so, the want of funded stocks would not occasion so great a demand for landed property as the author of the 'Remarks' supposes; nor would persons of small fortunes be prevented from deriving any profit from their surplus revenue. But admitting that there would be so great a demand for landed property as is assumed, and that an augmentation

* Rem. p. 201. † Ibid.

in price of articles of every description would be the consequence, we shall contend that such an augmentation results in a *still greater degree* from the vast quantity of funded debt both on account of the enormous taxes and the multiplication of the cash of the kingdom which it occasions. These enormous taxes and this multiplication of the cash of the kingdom are of the number of the inconveniences which Sir W. Blackstone has mentioned to arise from the national debt and to produce and increase the price of provisions and commodities. In maintaining therefore the truth of the learned commentator's observations with respect to those inconveniences, we shall at the same time invalidate the last mentioned arguments of Mr. Sedgwick. To those observations then we would in the next place beg leave to request the reader's attention.

Sir W. Blackstone,* after stating that "A certain portion of debt seems therefore to be highly useful to a trading people," but that "the present magnitude of our national incumbrances very far exceeds all calculations of commercial benefit, and is productive of the greatest inconveniences," proceeds to enumerate the exceptions which he takes against those incumbrances. "First" (says he) "the enormous taxes that are raised upon the necessities of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence, as of the raw material; and of course in a much greater proportion, the price of the commodity itself." The observations of Mr. Sedgwick upon the last sentence are principally urged with the view of showing that the advance in the price of the commodity is an imaginary burthen. 'Who is it' (he asks) 'that, according to the above statement, is injured by the operation of the imposts by which the interest of this debt is provided for? Is it those who provide the artificer with the necessities of life? No, for they must have redeemed themselves by raising the price of the artificer's subsistence. Is it that industrious class which supplies him with the unprepared produce which his ingenuity is employed to fabricate and per-

* Com. v. 1. p. 328.

fect? Certainly not, they have indemnified themselves by raising to him the price of the raw material. Is it, then, the artificer himself? Least of any; he even profits by it, since it seems he does more than recompense himself, by raising *in a much greater proportion*, the price of the commodity itself. If then, it be true that taxes occasion a general and proportionate advance in the price of commodities, this very circumstance; it must be acknowledged makes the burthen become imaginary.* There is reason to suspect that the gentleman has here deceived himself. Certain it is that there is no truth in his argument, for he seems not to have drawn the necessary conclusion which flows from the reflection, that the artificer of one article of consumption is himself the consumer of many others; with which in the way of commerce he has nothing at all to do. It is true enough with respect to the several persons through whose hands any particular commodity passes in its progress from a raw state to a state of perfection; for if he who buys dearer by three per cent. sells likewise dearer by three per cent if paying so much more he receives exactly so much more, he can incur no loss; but still there is some person who eventually pays 3l. more than he would have done but for the increase, and that is the consumer. It is to be observed also that the persons who are indemnified as to that particular article are themselves the sufferers with respect to others of which they are the consumers. Nay with respect even to that particular article the artificer himself is obviously a loser in proportion to his own consumption of it. To elucidate this matter—suppose the farmer to be taxed, and that 3l. is the proportion of it with respect to the wheat which he has grown, he, to reimburse himself, charges to the miller for his wheat 3l. more than he otherwise would, and therefore does not suffer by this tax. The miller when he comes to sell to the baker charges the additional 3l. at least, to indemnify himself, and consequently he does not suffer. The baker again rises the price of his bread enough to reimburse himself the additional price which he has given for his flour;

* Rem. p. 202, 203.

so that he also reimburses himself. But what shall we say of the consumer? Is he not a loser by the tax? Does he not pay more for his bread than he otherwise would? Is he reimbursed in any manner when the article does not pass from his into other hands. Let us suppose that the consumer of the bread is a hop grower, and is taxed 3*l.* in respect of his hops. He charges 3*l.* extraordinary to the hop merchant, and is, as to this particular article no loser; but his having reimbursed himself the money paid for his hops does not recompense him for the additional price which he has given for his bread, for his sugar, for his salt, and fifty other necessaries. The hop merchant charges the brewer—the brewer charges the publican, and they are indemnified as against the tax upon the particular article of hops, in which they deal, by their raising the price which ultimately falls upon the consumers. Now some of those consumers are the farmer, the miller, and the baker, in the former case. It is manifest therefore that the public at large suffer by the taxes; nay even that those very persons through whose hands any particular commodities pass are sufferers with respect to the increased price of those commodities so far as they are consumers of them, supposing that they merely reimburse themselves the increased sum paid in consequence of the tax.

The author of the 'Remarks' says that 'it will be found, upon accurate observation, that untaxed objects are generally raised to a price equivalent to the augmentation in those upon which the duties are immediately imposed; the rise of prices does not confine itself to the taxed commodities, but is extended to those which are not specifically taxed, and thus the one becomes eventually as dear to the consumer as the other.'* Why if the gentleman entertained this opinion, with what consistency could he argue that an individual's reimbursing himself in respect of one taxed object should be a sufficient compensation for the increased price which he must give for every other article, and that the burthen becomes imaginary!

Mr. Sedgwick observes* that 'We must not too readily conclude (as some, who have not sufficiently considered the subject have done), that because the manufacturer refunds himself the amount of the tax in the price of the commodity that he is therefore untouched, and that the whole burthen is shifted upon the consumer. It must be remembered, that this enhanced price of the commodity compels every consumer, in his turn, to raise that particular article in which he deals, to so much as will bring his profits to their ordinary level; thus the *manufacturer*, though he repays himself the duty laid on his particular merchandize, is himself necessarily, at the same time, a consumer of those articles which others, in order to reimburse themselves the amount of his increased prices, levy upon him. Although therefore,' he observes, 'every tax is said to be ultimately paid by the consumer, it does not therefore follow that he sustains the whole weight of it.' Now the first thing to be remarked is, that this statement of the gentleman tends to confirm instead of to invalidate the learned commentator's argument with respect to the inconvenience which taxes occasion by their tendency to raise the price of commodities; for if the consequence of imposing a tax upon any particular article is to augment not the price of that article only, to the consumer, but of other commodities also, the evil is aggravated. The next remark to be made is, that the gentleman absolutely does advert in the above paragraph to the fact of the manufacturer of one article, being a consumer of those articles, which others, in order to reimburse themselves the amount of his increased prices, levy upon him, although he contended in the preceding page that it was plain the different descriptions therein spoken of (and which make up the bulk of every state)—the husbandman, the grower of the rude material, and the manufacturer are *altogether unaffected* by taxes!

With respect to Mr. Sedgwick's conclusion, that the consumer does not sustain the whole weight of the tax, it seems to me that the very reverse is the truth and the only legitimate deduction from that gentleman's own rea-

* Rem. p. 204.

soning; for if the manufacturer repay himself the duty laid on his particular merchandize, the additional price must necessarily fall upon the consumer. Again, as the price of other commodities in which that manufacturer traffics not, is raised to him in common with others, on whom does that increased rise fall but upon that manufacturer in common with other consumers? But this is not all—for the gentleman seems to exclude from the number of the consumers of any particular commodity him who is the manufacturer of it; but we, on the contrary, maintain that *he* suffers in the *quality of a consumer* as much as other persons; that the sugar baker, for example, would be a sufferer by a duty upon sugar as to the quantity made use of in his family, the same as one who was concerned in a different branch of trade, or not concerned in trade at all; for it is most plain, that *he* is reimbursed the additional price which he himself pays upon his whole stock, *only* as to that quantity which again passes out of his hands in the way of trade.

It was the object of the author of the 'Remarks' in the passages above cited to prove that the consumer does not sustain the whole weight of any particular tax, and that the manufacturer himself is not untouched, since he is a consumer of other articles; and yet in a note, he supposes that such manufacturer raises the price of those commodities in which he trades so as to recover himself and bring his net income to what it was before. The note alluded to is as follows*—'If for example, additional duties are imposed on salt, soap, leather, &c. the whole descending series of dealers in these commodities add to their price the amount of the tax, and so much more as may indemnify them for their advance to government. Let us suppose the rise in these indispensable articles of domestic economy, diminish one thirtieth part the ordinary net income of B. a consumer, his resource is obvious: he instantly, in order to recover himself, either raises the price or lowers the quality of the article he manufactures (say cloth for instance), and levies again, from the consumers of that article, and from the soap boiler, the salter and the tanner

* Rem. note to p. 204.

‘ among the rest, the amount of that thirtieth part which
‘ their advanced prices would otherwise have deducted
‘ from his revenue and means of subsistence.’ Now if
Mr. Sedgwick be in this note correct, and if, as he asserts,
every dealer recovers himself by raising the price of his
own commodities so as to bring his income to what it
was previously to the deduction made from it by the rise
in the price of other articles, it is clear that *he* would be
untouched by the taxes. But the gentleman is grossly
deceived for admitting that the salter, the soapmaker, and
the leather-seller indemnify themselves for the additional
prices which they have been obliged to advance for their
respective commodities, and that the clothier also, repays
himself by raising the price of his cloth, for the increas-
ed sum which he has given for his salt, soap, and leather,
yet how are the salter, soapmaker, and the leather-seller in-
demnified for the increased price in cloth, or in what man-
ner are they and the clothier also indemnified for the in-
creased price in the produce of the land as well as of
every other article which, upon the gentleman’s reasoning,
will take place in like manner? To show the absolute futility
of such a notion, let us consider the case of the salter and
soapmaker—each being a consumer of that article of
merchandise in which the other deals. If a duty be
laid upon soap, the salter recovers himself for the increas-
ed price in soap, by raising the price of his salt, and by
levying that increased price from the soapmaker. Then
what is the soap maker to do in order to repay himself for
the rise in salt? Oh, the gentleman will say, his resource is
obvious—he must raise his soap to a still higher price, and
levy it upon the salter again. But how is the salter to
extricate himself—why by the same means to be sure;
and so on the one levying upon the other *ad infinitum*.
Was ever absurdity more glaring! It would be offering
an insult to the common sense of the reader, if I were
to insist upon it any further, that the consumers (includ-
ing the manufacturers themselves *as* consumers) are the
persons upon whom the taxes fall; that the value of com-
modities is really, not nominally only increased, and that
as the demand will lessen in proportion as the price be-
comes more exorbitant, taxes must consequently be injuri-
ous to trade.

Sir W. Blackstone continues to observe* that "The very increase of paper circulation itself, when extended beyond what is requisite for commerce or foreign exchange, has a natural tendency to increase the price of provisions as well as of all other merchandize. For, as its effect is to multiply the cash of the kingdom, and this to such an extent that much must remain unemployed; that cash (which is the universal measure of the respective value of all other commodities, must necessarily sink in its own value, and every thing grow comparatively dearer." But the author of the 'Remarks' says† 'That it is the effect of paper circulation to multiply the cash of the kingdom to such an extent, that much *must* remain unemployed is very doubtful; indeed the proposition itself is not very intelligible;' and as to the unintelligibleness of the proposition, he observes that 'the quantity of paper money or of specie that remains *unemployed*, can contribute nothing to overstock the *circulation*.' Now, clearly, the paper money unemployed cannot increase the paper circulation, nor does Sir W. Blackstone mean any such thing; but on the contrary, that it is the effect of paper money or paper circulation when extended beyond what is requisite for commerce or foreign exchange, so to increase the cash of the kingdom that much of that cash must remain unemployed. With respect to the fact, whether a circulation of paper so extensive hath the effect alleged or not, Mr. Sedgwick observes‡ that—'It is, besides, well known that any quantity of paper beyond what is requisite for commerce or foreign exchange, cannot long remain in circulation; the excess will return to be exchanged for gold and silver; this will quickly find its way out of a kingdom, in the trade and commerce of which it cannot be employed; and thus the superfluity is quickly made to disappear.' It is not easy to follow this writer, for he would overleap all the difficulties in his way at one bound—could he possibly suppose that such remarks as this would pass current with his readers for arguments? Where are the gentleman's

* Com. v. 1. p. 328.

† Rem. p. 207.

‡ Ibid.

reasons for believing that the excess of paper money, will in the case supposed be returned to be exchanged for gold and silver, and that this gold and silver will quickly find its way out of the kingdom? That it will find its way out of the kingdom, and quickly too, is; however, positively asserted; but whither or in what manner it migrates the gentleman sayeth not. Is the funded debt forgotten? Does not a very considerable portion of the cash of the kingdom remain unemployed in the public funds? When the author of the 'Remarks' can prove the negative of this, then, but not till then, will we subscribe to his doctrine, that no more cash remains in the kingdom than what is employed in its trade and commerce. He will not, however, it is presumed, make the attempt when it is brought to his recollection that there is in a future page* of his work a passage which says that 'the public stocks are the reservoir of the exuberance of that capital, which cannot readily be employed with equal gain in its trade, navigation, agriculture, and manufactures.'

Mr. Sedgwick proceeds,† 'That, it has a natural tendency to increase the price of provisions, as well as of all other merchandize, is an opinion which will perhaps appear, on closer examination, to be ill founded. 'Paper money,' says he, 'does not occasion a rise of prices; it only supplies the medium necessary to circulate the produce of labour, when that rise has already taken place. But Sir W. Blackstone does not assert that paper money has a tendency to occasion this rise, except when it is extended "beyond what is requisite for commerce or foreign exchange;" for his doctrine is that when it becomes so extended, it has the same influence in depreciating the value of cash, and consequently in increasing the price of provisions, as such an actual increase in specie would have. Whether this doctrine be sound or not must be left to the reader, who will find it minutely investigated above in a former page.‡ It will, however, be proper in this place to take notice of such new observations, as have been in this place adduced by Mr. Sedgwick, who supposes that paper money, instead of causing, follows the increase of prices. 'When in pro-

* Rem. p. 216. † Rem. p. 207, 208. ‡ Vide Tab. Contents.

' cess of time, whether by the great influx of persons to
 ' the metropolis, by taxation, by the spirit of monopoly.
 ' by general improvement, or whatever other causes the
 ' articles of ordinary consumption are advanced in their
 ' value, it becomes indispensable that the mass of specie,
 ' which was hitherto applied to the wants of commerce,
 ' should be augmented to the full amount of this incidental
 ' increase, in the nominal prices; to support this *deficit*
 ' a nation must augment its metallic currency to the
 ' amount required: if its credit is firm, and well secured,
 ' it will supply this exigence with more profit, and with
 ' greater promptitude, by means of bank notes, exchequer
 ' bills, bills of exchange, and such like symbols; its gold
 ' and silver being more serviceably employed.* That an
 increase in the price of commodities demands an increase
 in the amount of the capital required to circulate them, is
 obvious; but what reason is there for supposing that the
 increase in the price of articles of consumption, is attribu-
 table to all or any of the causes which Mr. Sedgwick has
 enumerated or left his reader to guess at? There abso-
 lutely is not a single syllable in the whole of his observati-
 ons which should induce us to hesitate a moment to con-
 cur with the learned commentator, in imputing that in-
 crease, in part at least, to the augmentation of the cash of
 the kingdom in consequence of the public debt, to an ex-
 tent beyond what is necessary for trade and commerce;
 and it will be sufficient, in this state of the dispute, just to
 suggest the question whether the increase of the paper
 circulation and multiplication of the cash of the kingdom,
 was in point of fact a measure adopted by government
 in consequence of the increased capital called for by the
 rise in the price of commodities? Or whether (and there
 is no reader, whose mind will waver in deciding) whether,
 that increase in the amount of paper circulation, or cash,
 has not been the consequence of that vast artificial capital
 the public stocks?

' If it be true,' continues Mr. Sedgwick,† ' that the abun-
 ' dance of specie in circulation lowers the value of money;
 ' or, what is the same thing, raises the nominal price of every
 ' thing, it might not unreasonably be presumed, that when
 ' a certain portion of this specie is withdrawn, a reduc-

* Rem. p. 208. † Ibid. p. 209.

'tion of prices would follow. If the public taxes withdraw their full amount from the current medium, its value must rise as its quantity diminishes; they then occasion, it should seem, a proportionable abatement in the general prices; and their ill effect is counteracted; if, on the other hand, their amount is not withdrawn from the general circulation, then the capital appropriated to the maintenance of industry remains unimpaired, and the complaint, so often urged of the *vacuum* produced in that capital is without foundation.' Now it is certainly true that the prices of things rise or fall in proportion as the money in circulation is abundant or scarce, meaning by the word money as well paper money as specie, for the withdrawing of the metallic currency would make no difference in the case, if its place should be supplied by paper money. With respect to the diminution in the current medium in consequence of the taxes, supposing the taxes to have such an effect, and the consequent rise in the value of that current medium, the gentleman in considering the subject seems to have lost sight of the principal, the interest of which those taxes are ordained to pay. If the circulation be increased by the addition of even one half of the principal, surely it must be seen that the effects of it cannot be counteracted by withdrawing from that circulation the mere interest upon that principal. This is all that is necessary to be urged in defence of Sir W. Blackstone's doctrine as far as it is attacked by Mr. Sedgwick in the passages last extracted: for as to the *vacuum* which is spoken of, the learned commentator has nothing to do with it. It may, however, be remarked, that the *vacuum* complained of is in the quantity of *metallic* currency, and that that *vacuum* may exist where there is a superabundance of *paper circulation*.

The author of the 'Remarks' inquires 'If the dearthness of commodities be in any part imputable to the abundance of specie, to what greater height would not those prices have attained, if unobstructed by those taxes which national exigences have imposed, an excessive accumulation had infinitely augmented that abundance?' But what reason have we for concluding that had there been no taxes there would have been an accumulation so excessive, as infinitely to augment the abundance of specie? In fact, recourse was not had to the funding system and the issuing of paper money, un-

til there existed such a scarcity as that the quantity of specie was inadequate to the national exigences. It is manifest also that but for the funding system there would have been a drain upon the specie equal to the amount of the national debt, that is, if they had raised the current expences within every year, for that year. To be sure a part of it would return into circulation; but still there is not any reason to think that had there not been any debt, there would be a greater abundance of monied capital including both specie, and, what has the same effect, paper money, for there would be the same return into circulation under the funding system as that of raising the supplies within the year. There is no ground therefore for any inference that the taxes have tended to keep down the prices of things.

Mr. Sedgwick continues*—‘The increase of the precious metals heightens, it is said, the prices of every thing; yet the augmentation of those metals is the effect of the progress of national wealth.—By how much the public debt is greatedened, the nation, we are told, is impoverished: yet taxes advance in proportion the prices of every thing; the same effect then is produced by the progress of national poverty. Are we not,’ he adds, ‘led to suspect somewhat of error and inaccuracy in these unsociable corollaries? An attentive inquiry,’ he asserts, ‘will convince us that the former proposition is unsound; and that an accession of specie to whatever amount will beget no alteration, *provided the produce of manual and agricultural labour be commensurate with that accession.*’ It is to be observed, first, that it is not asserted by the learned commentator that that increase of the precious metals which is the effect of the ‘progress of national wealth,’ or of the increased produce of the annual labour of the people, does tend to heighten the prices of things, as we have already observed. It is the increase from the quantity extracted from the mine, and the increase of paper circulation beyond what is requisite for commerce or foreign exchange, that, according to his doctrine, produce that effect; for by such augmentations the quantity of money would exceed the demand and quantity of goods. We are willing

* Rem. p. 209.

therefore to admit that the former proposition is unsound, desiring, however, at the same time, it may not be forgotten, that it is not the proposition of Sir W. Blackstone.

With respect to the remark that 'An accession of specie, * to whatever amount, will beget no alteration, provided * the produce of manual and agricultural labour be commensurate with that accession'—it is true enough in itself; and Sir W. Blackstone's doctrine is consistent with it, for an increase in the produce of labour will necessarily demand a proportionally larger quantity of cash to circulate it. But the case supposed by the learned commentator is when the increase of the cash of the kingdom is increased "beyond what is necessary for commerce or foreign exchange," a proposition which the author of the 'Remarks' has not attempted to controvert, but hath directed his arguments as if the proposition had been that *every* such increase had had the effect of raising the prices of things, and that too, although Sir W. Blackstone expressly says that the multiplying the cash of the kingdom to a certain extent is an *advantage* to the nation.

We now come to the second objection against the debt. "Secondly," continues Sir W. Blackstone, * "if part of this debt be owing to foreigners, either they draw out of the kingdom annually a considerable quantity of specie for the interest; or else it is made an argument to grant them unreasonable privileges, in order to induce them to reside here." In answer to this objection the author of the 'Remarks' says,† that 'Whatever be the amount of the interest accruing to foreigners from their investments in our funds, the principal must still remain behind, and, as may fairly be assumed, is converted to purposes which procure to the state a full equivalent for the interest remitted.' That the principal remains behind does not do away the inconvenience resulting from the interest being drawn out of the kingdom in specie. Then as to the *assumption* of the principal being converted to purposes which procure to the state an equivalent, the same purposes would have been attained by raising the expences within the year; and therefore they cannot supply any arguments in favour of the national debt or funding system. The assumption, however, cannot be admit-

* Com. v. 1. p. 329. † Rem. p. 211.

ted, for the capital borrowed is generally laid out, not in the improvement, but expended for the *defence* and *protection* of the state.

‘Nor,’ it is added,* ‘is this interest always remitted in specie: a considerable portion of it is drawn out in goods and bills of exchange; indeed it is believed, and with great reason, that the greatest part of the interest due to foreigners is not remitted at all, but that the dividends, so soon as they become payable, are reinvested in the funds; thus imparting fresh force to the stream of circulation,’ &c. Now even supposing this statement to be correct, the learned commentator’s objection is not weakened, for the danger still continues, inasmuch as they *may* draw the amount of their interest out of the kingdom, and in specie if they chuse to do so. And as to its imparting fresh force to the stream of circulation, it is clear that if, as the learned commentator has contended upon arguments which the gentleman hath not been able successfully to combat, the stream of circulation already overflows its channel, the fresh force imparted by the accumulation of those dividends would be injurious rather than beneficial.

‘Another circumstance deserves to be attended to,’ says Mr. Sedgwick.† ‘As the general rise of prices, occasioned by the increase of taxes, imperceptibly and by degrees extends itself to all commodities, the foreigner, by the advanced rate at which he purchases our exported produce, is, though unconsciously, made contributory to the payment of the interest due on his own principal.’ To this gentleman is due, it is believed, the honour of having been the first to suggest that the circumstance of the foreigners being obliged to purchase at an advanced rate is attended with advantageous consequences to the nation. The extent of our sale in the foreign markets of goods manufactured at home, depends materially upon the *cheapness* we can afford to vend them for, and in an especial manner with respect to those articles in which other nations oppose to us any competition. Every increase in price lessens the demand, and as the demand from abroad lessens, so does the encouragement given to trade and to labour and industry at home de-

* Rem. p. 211.

† Rem. p. 211.

crease in like measure. That the taxes produce a most pernicious effect upon our trade and manufacturers is therefore demonstrable from the very circumstance that we are compelled in consequence of them to vend our exported produce at an advanced rate, for if foreigners suffer from the taxes, we, so far from gaining, are in consequence losers in a much greater degree.

We come now to the third head of objection—"If the whole be owing to subjects only, it is then charging the active and industrious subject who pays his share of the taxes, to maintain the indolent and idle creditor who receives them."* 'This invidious reflection,' says Mr. Sedgwick,† 'is extremely undeserved. He that derives a revenue from the funds is not necessarily less active or less industrious than the person paying it. It is from a partial and erroneous view of the subject, that we are led to consider stock-holders as indolent and idle annuitants; as so many drones fed and fattened at the expence of the hive; as *lilies of the valley* that are attired without toil and without care.' That many proprietors of stock are active and industrious citizens must be admitted. It was not intended to create any *invidious distinction* between stockholders and others. The observation ought to be accepted as applying to the fund itself, rather than to those who possess a share of it; and the money sunk in the funds unquestionably is in an indolent and idle state compared to what it would be if employed in trade. It is for the gentleman to embellish his pages with what tropes and figures he pleases most certainly; but the reader may be assured that there is not any reason to think that in the learned commentator's judgment there was any point of comparison between holders of stock and lilies of the valley—any inference or inuendo contained in the 'Remarks' to the contrary in any wise notwithstanding.

The author of the 'Remarks' observes further, that were the funding system annihilated, 'the only difference would be that the money would be lent to private borrowers, for which they' (that is, those whose fortunes exempt them from the necessity of labour) 'are now creditors to the state: and as the risk in the latter

* Com. v. 1. p. 329. † Rem. p. 214.

'case would be greater, the interest would probably be higher: thus the evil would be increased.' But what reason is there to think, that if it were not for the funding system the rate of interest would be higher? for that is what is meant, it is presumed (although the words '*latter case*', as used in the above extract, would seem to refer to their being creditors of the state), since the gentleman evidently alludes to what he supposes the consequences of lending money to private borrowers would be if the funding system should be annihilated. Only a very few pages above* the author of the '*Remarks*' was inclined to think that were there no public funds 'the rate of interest would be *so low* as not sufficiently to compensate the 'hazard to the lender,' and here he supposes in the very same case that 'interest would probably be *higher*!' It is not for me, indeed it is not in my power to reconcile these contradictions.

Mr. Sedgwick continues†—'Were the subject completely investigated, it would prove to us, that the public creditor, even though he should subsist indolently on his income, nevertheless pays full tribute to the industry of his fellow-citizens. Besides that his capital is employed in the service of the state, he bears his full share of the common burden of the debt itself; nor must we omit to reflect, that as the taxes, by means of which his interest is provided for, raise the price of all commodities, he not only pays his quota in the direct taxation, but pays likewise just so much of the wages of industry as this advance of prices deducts from the nominal value of his income.' But it certainly is not easy to be perceived, how the man who lives indolently on his income can be said to pay full tribute to the industry of others, as it seems to me the reverse is nearer the truth, and as the taxes increase the price of articles of industry, the industrious citizen may be said to pay tribute to the public creditor, who receives those taxes. The public creditor, it is true, in common with all others who purchase those articles which are the fruits of industry, does so far pay tribute to the industry of others; but that goes no way towards proving that the active and industrious citizen who pays a share of the taxes does

* See Rem. p. 200 and *supra* p. 181.

† Rem. p. 215.

not contribute to the maintenance of the indolent and idle creditor who receives them: and although the public creditor pays not only his quota in the direct taxation but an advance of prices also; it will be sufficient to remark, that all others do the same; the active and industrious mechanic and labourer, as well as the man who lives indolently on his income, but then there is this material difference—although both contribute, *only the public creditor receives.*

Of the objections which Sir W. Blackstone hath urged against the present magnitude of our national incumbrances, there is only the following of which notice remains to be taken: “Lastly, and principally,” he says,* “it weakens the internal strength of a state by anticipating those resources which should be reserved to defend it in case of necessity. The interest we now pay for our debts would be nearly sufficient to maintain any war, that any national motives could require. And if our ancestors in King William’s time had annually paid, so long as their exigences lasted, even a less sum than we now annually raise upon their accounts, they would in the time of war have borne no greater burdens, than they have bequeathed to and settled upon their posterity in time of peace; and might have been eased the instant the exigence was over.” Now I must beg leave to remind the reader that Sir W. Blackstone’s position is that “the magnitude of our national incumbrances very far exceeds all calculation of commercial benefit, and is productive of the greatest inconveniences.” It is admitted that a certain portion of the national debt is highly useful. Mr. Sedgwick’s observations upon this last head of the learned commentator’s objections do not fairly meet the question for he says that—“A people that, in the plenitude of their forbearance, should refuse to engage in a war which existing circumstances rendered necessary, from an unwillingness to lessen the extent and fertility of those resources which after times might require, would probably remit their resentment until their impotence render it nugatory.” But it is not Sir W. Blackstone’s argument that the nation should not go to war when it is necessary, nor that it should not have

* Com. v. 1. p. 329.

recourse to the funding system if the requisite supplies cannot be otherwise raised within the year. He is only stating what the necessary consequences of that system are, and that amongst other evils it tends to weaken the internal strength of the state and to anticipate its resources.

‘It is idle to suppose,’ says Mr. Sedgwick,* ‘that if no public debt existed this superfluity would be hoarded up in time of peace to prepare against the emergencies of war.’ Upon which I have to observe, that this is not the supposition of Sir W. Blackstone, for he does not mean that any thing would be laid aside for the benefit of after generations; but that it is one consequence of the funding system to incumber the capital of the kingdom and to charge its future possessors with heavy payments out of its produce in respect of debts not of their own contracting—thereby anticipating those resources of the state which should be reserved to defend it; so that when the nation becomes involved in a new war which calls for the annual produce of its capital, it is found that a very considerable portion of that produce is drawn away to discharge the expences of former wars—expences with which the nation has been clogged by means of the funding system.

The author of the ‘Remarks’ observes also,† that—‘the latter part of our author’s exception seems to involve a question on which opinions have been much divided, viz. whether the raising the supplies within the year, or providing for them by means of the funding system, be the most eligible plan of finance, and the most consonant with expediency and political prudence? His reasoning, it is added, runs smoothly enough, as it takes for granted, that our ancestors in King William’s time were in a condition to sustain the pressure of their yearly burden without at all impairing their vital strength; whereas it was the utter impracticability of drawing *annually* the gross supply from the national revenue, at that time so disproportionate to the national exigences that suggested and rendered necessary the system of funding, then first established.’ But it is totally immaterial, as to the accuracy of Sir W. Blackstone’s obser-

* Rem. p. 216.

† Rem p. 218.

vation, whether our ancestors in King William's time could have raised the supplies within the year or not. He does not contend that the funding system ought not to be resorted to, but that it is attended with certain inconveniences. Neither does he condemn the conduct of the legislature of that day, for not raising the supplies within the year; but merely states what have been the consequences of their not doing so.

'That our progenitors of that day,' continues Mr. Sedgwick,* 'might have defrayed their expences with a less (nominal) sum than is at present required to discharge the interest, is perhaps true; but is it thence to be inferred, that therefore they would in the time of war have borne no greater burdens than they have bequeathed to and settled upon their posterity? In time of peace,† adds that gentleman, 'a nation in a more simplified and flourishing state of its commerce may be enabled to pay *annually*, without inconvenience, a sum which could not have been drawn from it without the most oppressive and hurtful consequences in an earlier and more unsettled period of its progress.' Now the meaning of the learned commentator's observations is not that the burden of any particular sum would not have been more grievously felt by our ancestors in King William's time, than any other adequate sum (taking into consideration the depreciation of specie since) would be now felt by us. What he means by saying that "they would in the time of war have borne no greater burdens," &c. is that the payment of a less sum or the bearing of a less burden annually than we now annually pay and bear in consequence of their debts and upon their aggregate amount, would have prevented the necessity of those debts having been incurred.

With respect to the remaining part of the gentleman's remarks, he is palpably mistaken if he means to advance any such opinion as that we are notwithstanding the vast load of debt with which we are now saddled, better able in the present extended and flourishing state of commerce

* Rem. p. 218.

† There is an error of the press in this part, but it is not of any importance as to the argument—the passage was no doubt intended to read thus—'upon their posterity in time of peace. A nation,' &c.

to pay the interest which we do pay on account of the debt incurred in King William's time than our ancestors of that day with an unincumbered national property were to pay a sum of equal value in that then comparatively unsettled period of its progress.

The author of the 'Remarks,' observes further that 'The argument in favour of levying the supplies within the year, that the nation is *eased the instant the exigence is over* is extremely fallacious. If, by providing for the current service of the state in time of war, within the year so much is deducted from the mass of *general capital*, as greatly to retrench the general means of consumption, the average supply at all times adapted to it, will decrease in proportion; the annual reproduction consequently, on which the annual resources of the state depend will lessen likewise; and will continue to decline with every fresh demand upon it.* But it is plain that there will be the same deduction from the mass of general capital whether the supplies are raised by a tax upon individuals in general, or whether the money wanted is borrowed from a few wealthy individuals. It is obvious too, that there will be the same return into circulation of the money required for the service of the state, in one case, as much as in the other. The argument, therefore, as to the consequences of a deduction from the mass of *general capital* goes for nothing.

Sir W. Blackstone also observes† in a future page, that "Our national debt and taxes (besides the inconveniences before mentioned) have also in their natural consequences thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors; who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight established this system in its stead," But Mr. Sedgwick remarks,‡ that this is 'an effect inseparable from the control and direction of an extensive revenue.' This is true, but then it is not to the purpose, for the learned commentator's objection here started against the national debt is, that it creates that extensive revenue, the control and direction of which produce the effect

* Rem. p. 219. † Com. v. 1. p. 335. ‡ Rem. p. 220.

complained of; and consequently that such effect is imputable to the national debt and funding system.

It is added also* that 'We must not permit our perception of the ill effects of the one system to divert our attention from the many mischievous and injurious effects to be apprehended from the other.' All that is very well. But then it is no argument to show that the funding system is not followed by those mischievous and injurious effects which Sir W. Blackstone alleges. It is for the reader to determine in his own mind upon a review of the whole arguments which he deems the most preferable system. It must be left to his determination also how far the observations which have been urged in favour of the learned commentator's positions are successful.

Speaking of the power of the crown, Sir W. Blackstone observes, that—"The stern commands of prerogative have yielded to the milder voice of influence." Upon which passage the author of the 'Remarks' says,† that 'It may well be questioned whether the milder tone of the one has succeeded *with much advantage* to the sterner accents of the other.' Now the learned commentator is not examining into, or even taking any notice of the comparative advantages resulting to the nation between the former and present state of the prerogative, although the gentleman has discussed the subject throughout as if that had been the case. Sir W. Blackstone's object is merely to show that "whatever may have become of the *nominal*, the real power of the crown has not been too far weakened by any transactions in the last century." That though "much is indeed given up; yet much is also acquired." It cannot therefore be necessary for me to follow Mr. Sedgwick in his discussion of the comparative advantages of the two.

* Rem. p. 220, 221.

† Ibid. p. 221.

CHAP. XI.

WE are called upon in this chapter to defend the following observations in the Commentaries,* relating to the relief of the poor. "The poor in England till the time of Henry VIII. subsisted entirely upon private benevolence, and the charity of well-disposed christians." "For, though it appears by the Mirror, that by the common law the poor were to be 'sustained by parsons, rectors of the church, and the parishioners; so that none of them die for default of sustenance;' and though by the statutes 12 Richard II. c. 7, and 19 Henry VII. c. 12, "the poor are directed to abide in the cities or towns wherein they were born, or such wherein they had dwelt for three years (which seems to be the first rudiments of parish settlements) yet till the statute 27 Henry VIII. c. 25, I find no compulsory method chalked out for this purpose: but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were in particular their principal resource." But Mr. Sedgwick says,† 'That the poor in England were, for so long a time left to subsist on casual and precarious bounty, has, with great reason been doubted. Sir Francis Eden,' he observes, 'infers from this statute, 12 Richard II. that the district to which the residence of impotent beggars was restricted was *bound to maintain them*, and that the justice of the peace, who had great discretionary power, regulated in some cases both the place in which they were to abide, and the amount of the donation which they were to receive.' Now, we would request the reader to peruse the statute itself, which is transcribed underneath,‡ and then ask him whether Sir Francis Eden

* Com. v. 1. p. 359. † Rem. p. 226.

"Item, it is accorded and assented, that of every person that goeth begging, and is able to serve or labour, it shall be done of him as of him that departeth out of the hundred and other places aforesaid, without letter testimonial as afore is said,

had sufficient grounds for any such inference. It is remarked that 'Though the statute only says that "if the inhabitants of cities and villages in which beggars were resident, at the time of passing the act, were unable or unwilling to maintain them, they should be taken to the places within the hundred, wake, or wapentake, or to the place of their birth;" yet 'such a proviso would then have been frivolous, had it not been understood that the district to which they were removed were bound to maintain.*' That, however, is a conclusion easily proved to be erroneous; but it is first to be remarked, that the statute does not say that they shall *be taken* to the places within the hundred, &c. but that the beggars themselves shall *draw them* to other towns, &c. leaving it a matter of choice with the beggar himself to what particular town within the hundred he would go, or whether he would not rather go to the place of his birth, than to any such town, if his place of birth happened to be out of such hundred; and the distinction is not immaterial, for if the inhabitants of the town in which the pauper was resident at the time of the proclamation had been directed to take him to any other town, it would in some degree countenance the supposition that the district to which he might be removed was bound to maintain him.

With respect to the assertion that 'Such a proviso would have been frivolous had it not been understood

except people of religion, and hermits having letters testimonial of their ordinaries, and that the beggars impotent to serve shall abide in the cities and towns where they may be dwelling at the time of the proclamation of this statute, and if the people of cities or other towns *will not* or may not suffice to find them, that then the said beggars shall *draw them to other towns* within the hundreds, rape, or wapentake, *or to the towns where they were born* within forty days after the proclamation made, and there shall continually abide during their lives; and that of all them that go in pilgrimage as beggars and be able to travel, it shall be done as of the said servants and labourers, if they have no letters testimonial of their pilgrimage under the said seals. And that the scholars of the universities that go so begging, have letters testimonial of their chancellor upon the same pain." See 12 R. II. c. 7.

* State of the Poor, v. 1. and Rem. 226.

' that the district to which they were removed' (rather take themselves) ' were bound to maintain'—so far from that being the case it was indispensable, supposing that they were not bound to maintain; for, as the former part of the act directs that all impotent beggars shall remain in the city or town where they be dwelling at the time of the proclamation of the act, that proviso which permits them to remove to other places was absolutely necessary with respect to those paupers who were resident in places the inhabitants of which either could not or would not maintain them, for otherwise they must starve: whereas that proviso allowed them a period of forty days to seek a residence amongst persons possessed of more benevolence. The very circumstance that the pauper had permission to depart to some other place, and especially as he was at liberty to go to what other place in the hundred *he* thought *proper*, or to the place of his birth, most strongly favour the supposition, that there was no *particular* place *bound* to maintain him: and besides, is there not every reason to think, that if there had been any particular place *bound* to maintain him, the act itself would have directed the pauper to be removed to that place, instead of leaving it to his option to go either to the place of his birth out of the hundred or to whatever place within the hundred, he might think proper. Indeed Mr. Sedgwick himself is constrained to observe* that ' the word *unwilling*, according to Sir Francis Eden's construction,† seems to imply an option in the particular district to refuse subscribing ' towards ' the maintenance of its poor; had this really been the ' case, there seems no good reason to be given why the ' like option should not have been extended to every ' other district to which they might be removed.' The ' gentleman, however, adds that in this case the intent of the ' statute would have been defeated, and its enactment have

* Rem. p. 226.

† The words of the statute are "*ne voilent*," which Sir Francis renders *unwilling*, but in the English edition of the statute, "will not" is set down as the proper translation. It is not, however, of any consequence, as it affects the question under consideration.

been altogether nugatory.* But this latter opinion is certainly incorrect, and I think there is reason to suspect that both Sir Francis Eden and Mr. Sedgwick have totally misconceived the intention of the legislature in passing the act; for it seems to me to be almost impossible to peruse the statute, and not conclude that the object of it was TO PREVENT VAGRANCY; for no stress is to be laid on the title of the act, because, as my Lord Hardwick observed in the case of the Attorney-General v. Lord Weymouth* "the title does not pass the same forms as the rest of an act, only the speaker, after the act is passed, mentions the title and puts the question upon it; therefore, said his lordship, the meaning of an act is not to be inferred from the title."

Mr. Sedgwick proceeds to observe further that "The poor being repeatedly defrauded of that relief to which, out of the good estate of the catholic church, they conceived themselves to be legally entitled; and the gifts to monastic corporations intended for their benefit, being otherwise applied, by means of the appropriation of benefices, it was expressly enacted, "that the diocesan of the district upon the appropriation of such churches, should ordain, according to the value of such churches, a convenient sum of money to be paid and distributed yearly of the fruit and profit of the said churches by those that shall have the same in proper use, and by their successors, to the poor parishioners of the said church, in aid of their living and sustenance for ever." "We have here then," the gentleman asserts, further evidence, that a *compulsory* method, however inadequate it might be to its essential end, was chalked out previously to the appearance of the statute 27 Hen. VIII. It must be admitted that this statute prescribes *something* compulsory; but not a compulsory method to attain the objects to which the learned commentator alludes, viz. to sustain the poor in the places where they are directed to abide, that is, in the cities or towns wherein they were born, or such wherein they had dwelt for three years; or, in the words of the statute of Henry VIII. that "All governors of shires, cities, towns, &c. should find and keep every aged poor and impotent person, which was born or dwelt three years with-

* Ambl. 20.

“ in the same limit by way of *voluntary and charitable*
“ *alms* in every of the same cities, &c. with such conve-
“ nient alms as should be thought meet by their discre-
“ tion, so as none of them should be compelled to go
“ openly in begging.” The statute therefore which di-
rects the diocesan to ordain a convenient sum of money
of the fruit of the churches to be paid and distributed
yearly in aid of the living and sustenance of the poor pa-
rishioners of the said churches does not chalk out any
compulsory method with respect to those purposes to
which Sir W. Blackstone alluded. The words dwelt by
way of *voluntary and charitable alms*, as used in the sta-
tute of Henry VIII. also show that previously to that
statute, no *compulsory* method existed for the payment
of alms to the poor. The intention of the statute 15
Ric. II. was to prevent the poor from being deprived of
that charitable aid which they had been accustomed to en-
joy from the fruits of the churches prior to their appropri-
ations, and of which those appropriations tended to deprive
them.

CHAP. XII.

THE twelfth chapter of Mr. Sedgwick's book commences with some criticisms on the observations of the learned commentator on the subject of allegiance—"Natural allegiance," says Sir W. Blackstone,* "is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the King of England there as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due." The doctrine thus laid down is commented upon in the 'Remarks' in the following terms. 'If this reasoning be well founded, our acts of naturalization are a direct and palpable violation of this principle of universal law, as they tend to withdraw from a foreign prince the allegiance of his natural born subjects. With us, the oath of allegiance may be tendered to all persons, whether natives, DENIZENS or ALIENS but how will this square with the foregoing doctrine? How shall we accommodate the practice to the principle?† Now it is observable, that Mr. Sedgwick does

* Com. v. 1. p. 369, 370.
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† Rem. p. 240; 241.
[E E]

not deny the existence of the principle or of the practice. Even supposing them to be at variance, the fault is not imputable to the learned commentator; nor are his observations which merely profess to state what that principle and that practice are, at all impeached by any incongruity between the two. Although it is stated that a natural born subject of one prince cannot put off his allegiance to him by any act of his own, no not even by swearing allegiance to another, yet it does not follow that he may not, if he thinks proper, swear such allegiance to another; for it is not pretended that by swearing such allegiance to another, he will be disengaged from his bond of allegiance to the first.

Our author himself lays it down as a *first principle*" continues the author of the Remarks,* that "every man " owes natural allegiance where he is born and cannot " owe two such allegiances or serve two masters at once." ' Yet an alien, naturalized,' the gentleman adds, 'is admitted to all the municipal privileges, benefits, and indulgences of the British constitution; he is empowered to ' take by descent or purchase; he takes the oath of ALLEGIANCE and supremacy,' &c. Now it is admitted that the learned commentator doth assert that the maxim of the common law which considered him an alien who was born out of the king's dominions or allegiance, proceeded upon the above *general principle*: and undoubtedly that principle is encroached upon by the naturalization of aliens, and by their being permitted to take the oaths of allegiance and supremacy to another prince; yet is there not any thing erroneous in the Commentaries upon the subject, for, as before observed, the contradiction is between the principle and the practice itself, and not between different passages in the Commentaries where that principle and that practice are represented to be such as they really are. If he had stated that *in point of fact* one cannot serve two masters at once, and had at the same time, said that by being naturalized, a man does contract such a double obligation, it would have been absurd; but instead of that he rather admits that a person who oweth allegiance to one prince, might by taking an oath of allegiance to another, actually owe service to two masters:

* Rem. p. 241.

thus the learned commentator, immediately after the sentence above quoted, adds*—"Indeed the natural born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties of *owing services to two masters*; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands, by which he is connected with his natural prince."

Mr. Sedgwick goes on to observe†—The principle moreover that "every man owes natural allegiance where he is born," must be understood with some exceptions. It is not, says he, mere local nativity that creates the reciprocal duties of allegiance and protection; since a person though born within the king's dominions may yet be accounted an alien; and the issue of alien parents, though born without those dominions, are deemed and considered as natives. This is true; but instead of correcting any observations in the Commentaries, it is merely an echo of them; for Sir W. Blackstone himself says‡—"When I say that an alien is one who is born out of the king's dominions or allegiance this also must be understood with some restrictions;" and in the following page he observes, that "all children born out of the king's allegiance whose fathers or grandfathers by the father's side were natural born subjects, are now deemed to be natural born subjects themselves."—So with respect to the children of aliens born in England—They "are, *generally speaking*," says the learned commentator natural born subjects, and entitled "to all the privileges of such.§"

"Local allegiance," Sir W. Blackstone defines to be "such as is due from an alien or stranger born, for so long time as he continues within the king's dominions and protection: and" says he "it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local, temporary only, and that for this reason, evidently founded upon the nature of government;

* Com. v. 1. p. 370. † Rem. p. 241. ‡ Com. v. 1. p. 372.

§ Com. v. 1. p. 373. ¶ Ibid. p. 370.

“ that allegiance is a debt due from the subject, upon
 “ an implied contract with the prince, that so long as
 “ the one affords protection, so long the other will de-
 “ mean himself faithfully.” Out of these passages and
 another which will presently be quoted, Mr. Sédgwick at-
 tempts to draw a fresh charge of inconsistency. ‘ Every
 ‘ stranger or alien resident, then’ says he, ‘ owes an allegi-
 ‘ ance *pro tempore* to the sovereign into whose dominions
 ‘ he is received, and under whose government he is pro-
 ‘ tected. But does not our author appear to broach a
 ‘ principle inconsistent with this doctrine, when speaking
 ‘ elsewhere of the incapacity of aliens to take by des-
 ‘ cent or inheritance, and describing it to national poli-
 ‘ cy he says, that “ had lands been suffered to fall into
 “ their hands *who owe no ALLEGIANCE* to the crown of Eng-
 “ land, the design of introducing our feuds, the defence
 “ of the kingdom would have been lost ?” * Now although
 it must be admitted to be a fair argument that there aris-
 es out of the last passage an implication that aliens owe
 no allegiance to the crown of England ; yet as Sir W.
 Blackstone is there speaking of aliens *in general*, and
 his observations extend to *all* aliens, including those who
 are resident abroad, that implication does not contradict
 his former assertion with respect to the PARTICULAR CASE
of an alien resident in this country that an alien *when so*
residing does owe a natural allegiance. Besides it is
 material to see what meaning the passage in which that
 implication is said to arise was meant to carry, and for
 what purpose it was used, and I think that we shall be
 justified in concluding that no such implication can fair-
 ly be said to arise out of it. Sir W. Blackstone had as-
 serted that the incapacity of aliens to purchase or inher-
 it arose rather upon a principle of national or civil po-
 lity than upon reasons strictly feudal, and then seeing
 that there existed a feudal, reason corrects himself by ad-
 ding—“ Though if lands had been suffered to fall into
 “ their hands who owe no allegiance to the crown of Eng-
 “ land, the design of introducing our feuds, the defence
 “ of the kingdom, would have been defeated.” Now the
 learned commentator in thus correcting his former ob-
 servations where he speaks of all aliens may be supposed

* CON . v. 2. p. 249.

by the words "if lands had been suffered to fall into *their* hands who owe no allegiance," &c. to mean those aliens who are not resident in this country, and as the passage admits of this interpretation it is not a necessary inference that aliens so residing in England do not owe allegiance to the crown of England, especially as the learned commentator asserts in another place that from them such allegiance *is* due.

Sir W. Blackstone observes,* that "An alien born may purchase lands, or other estates: but not for his own use, for the king is thereupon entitled to them." This Mr. Sedgwick considers neither *equitable* nor *politic*—As local differs from natural allegiance, chiefly, as it is temporary only; and as an alien is subjected, so long as he continues within the king's dominions and protection, to the same moral obligations with a native, there seems not to be much of equity, nor indeed of sound policy in putting it out of his power to acquire any lands, or other estates, to his own use.† It is to be observed then that the gentleman does not question the accuracy of the learned commentator's position. He only disputes the propriety of the law itself; but in so doing does not as might have been expected, offer his reasons for thinking it inconsistent with sound policy; nor does he combat all the arguments which Sir W. Blackstone hath advanced in favour of it. One of them is a very strong one that thereby "the nation might in time be subject to foreign influence.‡" Another reason assigned by him is that "If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that which he owes to his own natural liege lord."§ Upon this last reason the author of the 'Remarks' observes, that— "When we consider the effects of our acts of naturalization, and that the oath of allegiance to the sovereign of Great Britain may be administered to *aliens* this scruple seems to be somewhat out of place. If no one, moreover, can divest himself of those civil obligations, which by birth, he has contracted to his liege sove-

* Com. v. 1, p. 371. † Rem. p. 242, 243. ‡ Com. v. 1. p. 372.
§ Ibid. p. 371.

'reign the scruple itself is superfluous.' But the objection to their being permitted to swear allegiance to the king of England, does not spring from any scruples as to the injustice of such permission towards their natural lords, but from the danger which would exist if lands were held by those from whom allegiance is due to a foreign prince inasmuch as such allegiance might possibly enjoin him to act contrary to the interests of the king of England, which is very far from being a mere unimportant scruple. The same argument, it must be admitted, holds in part against naturalization, but then there is this difference, that when they come to reside here their persons are responsible for their fidelity, which would not be so if aliens in general were permitted to hold landed property.

'An ambassador, it is said,' continues Mr. Sedgwick, "owes not even a local allegiance to the prince to whom he is sent."* And he then asks, 'If local obedience be, as confessedly it is, a duty resulting from protection, on what principle of reason or policy, is it that 'an ambassador is held exempt from this claim? Wherefore should a personage, who of all others is most avowedly the object of protection to that state in which, for a time, he is called to reside, to be excused from the observance of that duty, which local allegiance includes? So strange and singular an exception,' adds the gentleman, 'seems neither essential to his dignity, nor conducive to his service.'† The answer to this is, that it would be derogatory to the dignity of the prince that his ambassador should owe any allegiance to another. It would be placing the prince who is represented, in the character of a subject to the prince to whom such ambassador might be sent. "Ambassadors," says the Baron Montesquieu, "are the voice of the prince who sends them, and this voice ought to be free; no obstacle should hinder the execution of their office; they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accused, if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged. Thus a prince who has naturally a bold and enterprising spirit, would

* Com. v. 1. p. 373. † Rem. p. 243.

"speak by the mouth of a man who had every thing to fear. We must then be guided with respect to ambassadors, by reasons drawn from the law of nations, and *not* by those derived from *political* law."*

'The doctrine contained in the following passage, 'must not,' says the author of the 'Remarks' 'be passed over without remark.' "As the prince affords his protection to an alien, only during his residence, in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence and (in point of locality) to the dominions of the British empire. From which considerations Sir Matthew Hale† deduces this consequence, that though there be an usurper of the crown, yet it is treason for any subject, whilst the usurper is in full possession of the sovereignty, to practise any thing against his crown and dignity: wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (*unless in defence or aid of the rightful king*) have been afterwards punished with death; because of the breach of that temporary allegiance, which was due to him as king *de facto*. And upon this footing, after Edward IV. recovered the crown, which had been long detained from his house by the line of Lancaster, treasons committed against Henry VI. were capitally punished though Henry had been declared an usurper by parliament."‡ It is not clear whether Sir W. Blackstone means to adopt the ideas of Sir Matthew Hale upon this subject or not. Mr. Sedgwick's reasoning against it is to the following effect—"An usurper must, *ex vi termini*, have seized the sceptre in manifest violation of the submission and good faith due from him to his rightful prince. Who but will allow, that in this case, the nation collectively is justified in desposing him in favour of the lineal successor, and the settled form of the constitution? But if it be treason to *practise any thing against his crown and dignity*, that collective right is positively annulled."§ Now it is observable that this reasoning proceeds chiefly upon the supposition, that the opposition made to the usurper is in

* See Mont. Spirit of Laws, b. 26, c. 21. † 1 Hal. P. C. 60.
‡ 1 Com. v. 1. p. 370. § Rem. p. 244.

favour of the lineal successor ; and in such a case Sir Matthew Hale holds it to be justifiable by his excepting such attempts, as are made *in defence or aid of the rightful king*. It must be allowed, however, that there is much force in the gentleman's remarks upon this subject, as also upon those next following, where it is stated that allegiance is applicable to the natural person as well as to the political capacity of the king : but still they do not impeach the accuracy of the learned commentator, because the doctrines, although exceptionable in themselves, are such as he has represented.

We have now to pursue Mr. Sedgwick through his remarks upon what he considers the confused and contradictory observations of Lord Coke, Sir W. Blackstone and others, upon the corruption of blood and extinction of its heritable quality, consequent upon attainder. "It is a general rule," says Lord Coke,* "that having respect to all those whose blood was corrupted at the time of the attainder, the pardon doth not remove the corruption of blood neither upward nor downward. As if there be grandfather, father, and son; and the grandfather and father have divers other sons, if the father be attainted of felony and pardoned, yet doth *the* blood remain corrupted not only above him and about him, but also to his children born at the time of his attainder." According to this doctrine, Mr. Sedgwick says, 'it should seem that not only the blood of the attainted person himself, but the blood of his issue, *et nati natorum et qui nascentur ab illis* and of his relatives along the whole ascending, descending and transversal series is corrupted and its heritable equality extinguished.'† But no such consequences follow from the above doctrine of Lord Coke ; for it is the blood of the attainted person that is corrupted, and no one is incapacitated, but where they must claim through and in right of that corrupted blood. The observation is, "that, if the father be attainted and pardoned, yet doth *the* blood remain corrupted," &c.—Whose blood but the blood of *the father*? It is said to be corrupted above him and about him, and to his children born at the time of his attainder. What is so corrupted but the blood of the

* Co. Litt. 392. a.

† Rem. p. 255.

father? Now every man is said to contain so many different bloods in his veins as he hath lineal ancestors,* and, therefore, it is impossible to conclude that Lord Coke's expression, as to the blood of the father being corrupted, imports that the 'blood of the issue, and of the relatives of the father along the whole ascending, descending, and transversal series, is corrupted and its heritable quality extinguished,' because they have various pure bloods in their veins in addition to the corrupted blood of the father, and consequently it cannot even upon any forced construction, be correctly said that the above observations in Lord Coke's Commentary, are any authority for the doctrine that the issue and relatives of the attainted father are prevented by such attainder, from inheriting in right of their pure blood.

The author of the 'Remarks' says that the text of Littleton, seems not to warrant the above comment of Lord Coke. The words of Littleton† are "*Car le garrantu tout foits demurt a le common ley, et la common ley est, oue quant home est attainct ou utlage de felonie, quel utlagarie est un'attainder en ley, que le sanke perenter luy et son fits et tous auters queux serra dits ses heires, est corrupt issint que riens per discent poit descendre a aucun que poit estre dit son heire per le common ley.*"

It appears to me, says Mr. Sedgwick, 'that by the phrase of Littleton "*et tous auters queux serra dits ses heires,*" it is not meant to imply that the blood of the person attainted, and the blood of all others who may be his heirs, is corrupt; nor can be construed to mean that the blood between him and his son (*perenter luy et son fits*), and between all others who may be said his heirs, is corrupt; but means only, that the blood between him and his son, and BETWEEN HIM and all persons, &c. the words *perenter luy* being here understood.‡ The gentleman, is certainly correct in this exposition of the passage in Littleton, and he was mistaken in supposing that Lord Coke understood it in any other sense. Upon the whole then, it appears that the text of Littleton, does warrant the above comment of Lord Coke; but that the comment of

* See Bl. Com. v. 2. p. 203. † Lit. Ten. sect. 747.

‡ Rem. p. 256.

Lord Coke does *not* warrant Mr. Sedgwick's construction of it.

'It deserves particular note,' continues the author of the 'Remarks,' that Lord Coke distinctly enumerates "the *five* punishments inflicted upon him, that is AT-TAINTED OF TREASON OR FELONY, 1. He shall lose his life, and that by an infamous death between heaven and earth, as unworthy in respect of his offence, of either. 2. His wife, that is a part of himself, (*et crunt animæ duæ in carne unâ,*) shall lose her dower. 3. *His blood is corrupted,* AND HIS CHILDREN, *cannot be heirs to him*; and if he be noble or gentle before, he and all his posterity are by this attainder made ignoble. 4. He shall forfeit all his lands and tenements; and 5. All his goods and chattels." From this last statement of Lord Coke, Mr. Sedgwick pronounces it to be 'clear beyond all controversy that the *heritable capacity* of the ancestor or descendants of the attainted party is not, nor is meant to be, in any manner affected by the judgment, which in this respect, attaches solely to the traitor or felon himself.' Now if the gentleman means that the heritable capacity of the descendants and other relatives of the person attainted of *inheriting any other person* than the attainted person himself, is not affected, it is admitted that it is not; but if he means that the heritable capacity of such his descendants, and other relatives of inheriting *the person himself*, who is attainted, or of inheriting any other ancestor *through* the person attainted, (and from this saying, that it attaches *solely* to the traitor or felon himself, that seems to be the gentleman's meaning,) then most certainly no such conclusion is warranted by the passage in Coke, for Lord Coke says that "his blood is corrupted," the necessary consequence of which is, that no one can inherit him or through him, nor can he inherit any one. He also says that *his children* cannot be heirs to him, but we are not to conclude from this particular mention of the incapacity of his children, that all other persons who in general cases, are capable of inheriting may in this case inherit him. In saying that his blood is corrupted he had sufficiently expressed that neither his children nor any other person was capable of inheriting in right of such blood; and he mentions this corruption of blood, as one of the *punish-*

ments for committing treason or felony, and therefore the obvious reason why he mentions particularly the incapacity of the children to inherit, is, that a man, must be much more grieved at, and *punished* by *their* inability, to inherit him, than by the inability of any remote relative.

But Mr. Sedgwick afterwards finds other passages in Lord Coke's Commentary, which he deems to be totally repugnant to each other. The first of those passages is as follows—"The judgment against a man for felony, is, "that he be hanged by the neck until he be dead; but "*implicative*, (as hath been said) he is punished first in "his wife, that she shall lose her dower. Secondly, in "his children, that they shall become base and ignoble; "as hath been said. Thirdly, that he shall lose his posterity, for his blood is stained and corrupted, and they "cannot inherit unto him or any other ancestor.*" Upon this passage the following comment is made in the 'Remarks'—"That his *posterity* shall be unable to claim 'immediately as heirs to him, follows from the very nature 'of the sentence; but that such posterity not only cannot 'inherit to him, but *cannot inherit* to ANY OTHER ANCESTOR is clearly no part of the judgment, nor can, by any 'equitable and sound interpretation, be shown to result 'from it.† Now the gentleman has completely overlooked the very material circumstance, that Lord Coke was not speaking of the consequences which ensued from a judgment for felony in his day; but as *the common law stood* in this particular. This is most evident because immediately after enumerating the above punishments for the crime, he adds. "And thus severe it was *at the common law*;" and it is extraordinary that the gentleman did not advert to it as he must have seen that the loss of the wife's dower, is mentioned amongst those punishments, and as he cannot but be supposed to have known, that although it was so at common law, yet that she was afterwards made dowable by statute.‡

We come now to the passage which is said to be totally repugnant to the one last above quoted. "If a man

* Co. Litt. 392. b.

† Rem. p. 257.

‡ See the stat. referred to in Co. Litt. 392. b. under the letter [a]

“ hath issue two sons, and after is attainted of treason or felony, and one of the sons purchase lands and dieth without issue, the other brother shall be his heir ; for the attainer of the father corrupteth the lineal blood only ; and not the collateral blood between the brethren, which was vested in them before the attainder, and each of them by possibility might have been heir to the father ; and so it hath been adjudged.”* Now where is the alleged repugnancy, since Lord Coke was in the last passage speaking of what the law was in his time, whereas in the former passage, he stated the doctrines that the common law expressed upon the subject? Indeed he does with his usual caution take care to apprise his reader, that formerly the law had been held to be different from what he had laid down in the last sentence, for referring to Blackton,† Britton,‡ and Fleta§, he says, “ But some have holden that if a man after he be attainted of treason or felony, have issue two sons, that the one of them cannot be heir to the other, because they could not be heir to the father, for that they never had any inheritable blood in them.”

The author of the ‘ Remarks’ in observing upon the above passage which relates to a descent from one brother to another, says—‘ It seems evident, beyond contention, that the same principle on which the brothers may be heir to each other, reaches every case, in which the inheritor is not compellable to derive his title through the attainted ancestor.’¶ Upon which I have only to observe that the gentleman has been drawn into an unnecessary discussion of the subject, from an erroneous supposition that Lord Coke had advanced any other doctrine with respect to the law at the period when that great lawyer wrote his commentary.

Mr. Sedgwick in the next place proceeds to attack the observations of Sir W. Blackstone upon the same subject, which he commences, by observing, that ‘ Sir W. Blackstone apparently follows Lord Coke, and it must be owned with somewhat of the same indecision.’ But before I state the remarks of Mr. Sedgwick upon some *disjointed* parts of that particular passage in the Com-

* Co. Litt. 8. a. † Lib. 3. fo. 130. ‡ Brit. fo. 15.

§ Fleta, lib. 1. cap. 88. ¶ Rem. p. 257.

mentaries which conveys the learned commentator's ideas upon this point, I will take the liberty of laying before the reader the passage itself in its *entire state*. "Another immediate consequence of attainder," says Sir W. Blackstone, "is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture; and the person attainted shall also obstruct all descents to his posterity; wherever they are obliged to derive a title through him to a remoter ancestor." It seems to me almost impossible for any writer, however strong his disposition to cavil may be, not to admit that the meaning and consequences of this corruption of blood both upwards and downwards are pointed out and defined with sufficient distinctness in the above passage; but Mr. Sedgwick in his remarks upon it, says 'If the blood be corrupted downwards, it follows that the posterity, *in infinitum*, of the party attainted, can neither be heirs to each other; nor have heirs themselves; neither can any inherit through them from the defect of heritable blood; every title therefore, is defeated and must be defeated and fall to the ground, when any one among them chances to cross the course of descent. If it be corrupted upwards,* says the same gentleman, 'it becomes tantamount to a total extinction of the heritable capacity of all his ancestral kin however remote, which chance to be a link in the chain of inheritance, through which any pedigree is to be deduced. Thus, not only the possibility of claiming through the attainted ancestor is destroyed, but the means of substantiating any title through his ancestors or descendants from the first generation to the last.*' Now it surely was futile as well as injudicious, thus to argue that the observations in the Commentaries authorized any such conclusions, when Sir W. Blackstone had defined the meaning of this corruption of blood both upwards and downwards to be very different from such conclusions, and which he does distinctly by

* Rem. p. 257, 258.

going on to observe—"so that an attainted person can neither inherit," &c. But had not Sir W. Blackstone pointed out the meaning of the expression of a corruption of blood both upwards and downwards, what Mr. Sedgwick alleges would by no means follow; for whose blood is it that is corrupted? Certainly the blood of the person attainted, not the blood of his ancestors, his brethren, or his children, as was above observed upon a similar assertion by Lord Coke.* The blood which the latter for example, have in their veins, is only one half the blood of the father, but the corruption of this half doth not in judgment of law contaminate the whole mass, and consequently doth not prevent them from inheriting in right of what pure blood they have, and therefore is it that the heir *ex parte materna*, may inherit his maternal ancestors, notwithstanding the attainder of his father, as Lord Coke himself has held in another place,† and in so doing hath not for the same reason refuted the principle previously laid down by him as the author of the 'Remarks' in a note‡ asserts.

Mr. Sedgwick having thus commented upon this principle that the immediate consequence of an attainder is a corruption of blood both upwards and downwards, afterwards states another *portion* of the passage already before the reader, viz. that "the attainted person shall also obstruct all descents to his posterity, *whenever they are obliged to derive a title through him to a remote ancestor*," and allows that *thus restricted*, the doctrine is explicit, genuine, and admissible. These restraining words the gentleman informs us are *in the very page*, in which the principal is found. He might have also added, *in the very identical sentence and A PART OF THAT SENTENCE*. It is matter of complaint against Mr. Sedgwick, that he should have offered his criticisms upon the principle as if it had been unrestrained or unexplained by any other words in the same sentence; notwithstanding those restrictions actually do form a part of it. A more unfair mode of disputation cannot exist, than thus to comment upon the disjointed parts of one and the same sentence as if they had been distinct and sub-

* Supra. p. 216.

† Co. Litt. 187. a.

‡ Rem. p. 258, in a note.

stantive sentences when, one part is intended by the author to qualify or explain the rest; and had not the gentleman had recourse to it in this instance it would have been manifest at the first glance, what is after the above detection sufficiently apparent, that, his criticisms upon this subject are unsupported by any even the most flimsy reason.

In the case of the Earl of Holderness,* Lord Chief Baron Hale held, that “ the attainder of a lineal ancestor *shall not hinder collateral descents*, as the attainder of the father shall not hinder the descent among brothers; and for this cause, because the father is not the *medium* through which the descent between the brothers, is derived, or rather the father is *medium deferens sanguinem*, and the brother is *medium deferens hereditatem*.” Upon the authority of which and Hale’s Pleas of the Crown,† Mr. Sedgwick observes that ‘the consequence of the judgment in high treason, is corruption of blood of the party attainted; so that he cannot be heir to any one, nor can title, *propter defectum sanguinis* be derived from or through him; wherever it is not necessary to deduce a title through him, the inheritance is consequently not impeded.’ Now this is the very doctrine of Sir W. Blackstone and Lord Coke. Let any man peruse the whole of their observations upon the subject, compare them together, and understand them and he will not consider them authorities for any other conclusion.

* 1 Sid. 193, and 1 Vent. 413, under the name of Collingwood and Pace. † H. P. C. 1. 354.

CHAP. XIII.

“ IN a land of liberty,” says Sir W. Blackstone,* it is “ extremely *dangerous* to make a distinct order of the “ profession of arms ;” and Mr. Sedgwick controverts this position by contending that it is *unavoidable*—“ Amidst “ the diversified employments which an affluent commercial “ empire affords, and the gainful occupations which it holds “ out, the military profession will unavoidably become a “ *distinct order*.” But it is not attended with less danger because it is unavoidable. That it is unavoidable, the learned commentator does not deny, for he afterwards observes† (without remarking that the measure is not called for) that—“ As the fashion of keeping standing armies has of late years universally prevailed over Europe, it has also for many years past been annually “ judged necessary by our legislature, for the safety of “ the kingdom, the defence of the possessions of the “ crown of Great Britain, and the preservation of the “ balance of power in Europe, to maintain even in time “ of peace a standing body of troops, under the command of the crown.” Although however there is a necessity for the military power being a distinct body, yet in the opinion of Sir W. Blackstone, nothing ought to be more guarded against in a free state than making the military power too distinct. By way of precaution it ought only “ to be enlisted for a short and limited “ time ; the soldiers also should live intermixed with the “ people, no separate camp, no barracks, no inland fortresses, should be allowed.”‡ These are the sentiments of Montesquieu,§ who thought those means calculated to give the armies the same spirit as the people, and that such a spirit was necessary, in order to prevent the executive power from being able to oppress ; and it is conceived that Mr. Sedgwick offers no arguments against the plan of

* Com. v. 1. p. 408.

† Ibid. 413,

‡ Ibid. 414.

§ Sec Sp. of Laws v. 1. b. ii. c. 6.]

dispersing the soldiery amongst the people with the view of preventing them from being instruments of oppression, when he asserts that they usually herd with the low and vicious. That assertion is founded upon the presumption that the army is composed of the low and vicious: *similes similibus gaudent* is an adage the application of which is urged by the gentleman himself. Then if the army consists of the low and vicious, it appears very certain that the company which the soldiers will keep by associating with the low and vicious in barracks, will not be more respectable than if they were to associate with the low and vicious amongst the people. If the arguments on each side are not in this respect ballanced, they certainly do not incline the scale more in favour of the soldiers living in barracks where they have so great a proportion of the low and vicious to herd with, than in being dispersed amongst the people where there is a comparatively much less proportion of worthless character. But admitting the arguments on this point to be equal, it seemsevident, that the soldiery are more likely to imbibe the spirit of the people when dispersed among the people, than when they are entirely detached in consequence of their being secluded in barracks. Admitting also, for the purpose of looking at the gentleman's argument in its strongest light, that by associating with the low and vicious, the soldiers would be impregnated with the spirit of the low and vicious; yet is it not to be believed that by possessing that spirit, the executive would more easily be able to oppress by their means, (which is the only question in dispute,) for no persons have a greater dread of oppression, than those of that very description to which the author of the 'Remarks' alludes—none are more forward in support of all popular questions wherein the rights of the people are, or are supposed to be concerned.

The opinion of Montesquieu however which Sir W. Blackstone is said to have adopted is not fairly stated. 'The reasons assigned for his (Montesquieu's) opinion,' says Mr. Sedgwick 'destroys its authority. He assumes a standing army to be "composed chiefly of the "most despicable part of the nation;" 'But is a militant body thus composed, likely to associate with those 'whose manners and mode of thinking may mould them

‘to patriotism?’* Looking no farther than the pages of the ‘Remarks,’ one might have been induced to suppose that in Montesquieu’s opinion, the security of a nation against a standing army composed of the most despicable part being made instruments of oppression, was to be looked for in their disposition to associate, with those whose manners and mode of thinking would, ‘mould them “to patriotism,”’ but the doctrine of that author was, that it was requisite for the security of a nation, that should it have a standing army so composed, that army should be liable to be disbanded by the legislative power, “If there should be a standing army composed chiefly of “the most despicable part of the nation, the legislative power should have a right to disband them as soon as it “pleased.”†

In addition to barracks and separate camps not being permitted, Sir W. Blackstone adds, that “Perhaps it might “be still better, if by dismissing a stated number and “enlisting others at every renewal of their term, a circulation could be kept up between the army and the “people, and the citizen and the soldier be more intimately connected together.”‡ That a circulation would be kept up between the army and the people if the plan suggested by the learned commentator were adopted, is obvious—it is obvious also, that the army would less regard themselves as a distinct body: but whether the advantages arising from this plan might not be more than counterbalanced by its disadvantages, Sir W. Blackstone himself seems not to have formed a decisive opinion. There appears, however, to be great force and reason in the extracts which the author of the Remarks hath given from Michell’s Principles of Legislation upon this subject.

* Rem. p. 265, 266. † Spir. of Laws v. 1. b. ii. c. 6.

‡ Com. v. 1. p. 414.

CHAP. XIV.

SPEAKING of the law which ordains that "persons serving seven years as apprentices to any trade, have an exclusive right to exercise that trade in any part of England," Sir W. Blackstone observes—"This law, with regard to the exclusive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humour of the times; which has occasioned a great variety of resolutions in the courts of law concerning it; and attempts have frequently been made for its repeal; though hitherto without success."* But the author of the 'Remarks' says† that—"We shall be justified in considering the opposite opinions which have alternately predominated on this subject, not as arising from the prevailing humour of the times, but as being the infallible consequence of a regulation, which conferring invidious and partial benefits, and giving sanction to adverse pretensions, naturally produces opposite judgments and conflicting opinions. They whose individual interests are thus exclusively befriended, will, as may be expected, contend strenuously in behalf of a law which operates, as to them so favourable an effect, while the unprejudiced and impartial, on the other hand, contend with no less zeal in favour of the liberal and universal extension of every right, to which all, as men and citizens of a free state, are fairly entitled." Now the question is—to what ought we to attribute that difference of opinion with regard to this law, which hath occasioned such a variety of resolutions in the courts of law, and it seems to me by far the most reasonable as well as liberal conclusion, that it hath been occasioned by the prevailing humour of the times, in other words, by a different opinion entertained at different times with respect to the policy of the measure, rather

* Com. v. 1. p. 427.

† Rem. p. 273, 274.

than to attribute any of those resolutions to the ascendancy of the influence of persons whose individual interests are exclusively befriended. The author of the 'Remarks,' hath, in the above passage said in effect, that those whose interests are thus befriended, will contend strenuously in behalf of the law; whilst those who are *unprejudiced* and *impartial* will contend with no less zeal against it; but in so doing, hath said nothing to the purpose, for it assigns no reason why different legal determinations have taken place upon the subject, nor can any except that which the learned commentator himself hath given, be assigned without impeaching the integrity of our courts of justice. Indeed there seems to spring out of the gentleman's remarks something very like an inference that such of the resolutions of our courts upon the subject as have professed to proceed upon the supposition that the statute is a salutary one, are in fact attributable to prejudice and partiality, for the *unprejudiced* and *impartial* according to him, are adverse to such restraints.

Sir W. Blackstone observes also* that "At common law every man might use what trade he pleased, but this statute† restrains that liberty to such as have served as apprentices: the adversaries to which provision say, that all restrictions (which tend to introduce monopolies) are pernicious to trade; the advocates for it allege, that unskilfulness in trades is equally detrimental to the public, as monopolies." It is observable here, that the learned commentator does not give any opinion which of these two reasons he considers as entitled to the most weight, and consequently in commenting upon the observations which have fallen from Mr. Sedgwick with respect to the last of those reasons we shall not be considered as offering any thing in the defence of the learned commentator.

'The chief design of the legislature,' says the gentleman, 'in enacting the statute of apprenticeship, was no doubt the preventing persons from exercising any trade or craft for which they had not previously prepared themselves by a sufficient course of instruction. This design certainly is commendable, and its attainment is a thing to be wished. But it is an absurdity (and an

* Com. v. 1. p. 427.

† Stat. 5 Eliz. c. 4. s. 41.

' absurdity operating in the spirit of injustice), to require
 ' without discrimination, a seven years apprenticeship to
 ' trades, a perfect knowledge of which may be attained
 ' with very different degrees of application and in very
 ' different periods of time.* But Mr. Sedgwick should
 have informed us, by what method the time necessary to
 complete the instruction of any particular youth is to be
 ascertained, and the degrees of application which he
 would devote; things which can only be discovered in the
 course of his progress. That gentleman indeed does say
 that ' the intention of the legislature would have been
 ' equally fulfilled had a certificate of qualification been
 ' granted to the proficient as soon as he should have made
 ' such progress as might enable him to support himself,
 ' by making it the interest of others to employ him.†
 But if the proficient's agreement with his instructor were
 to cease as soon as he had attained a sufficient degree of
 skill to enable him to maintain himself, it is asked who
 would take upon themselves the office of instructors?
 It is but reasonable that the apprentice should work for his
 master sometime after his labour is serviceable and a source
 of emolument to his master. Every proficient is neces-
 sarily a great expence to his instructor not merely in con-
 sequence of the time consumed in his instruction, but
 in the loss sustained by the materials spoiled and rendered
 useless during his novitiate. Thus the 6th Geo. III. c.
 25, recites that " apprentices are taken who for several
 " years of their apprenticeships are rather a burden than
 " otherwise to their masters." Nay, it is to the advan-
 tage of the learner himself, that his master should have
 to look forward to the deriving some profit from his labour
 during the latter part of his apprenticeship, for to a moral
 obligation another inducement to the master's taking all
 pains possible to render him skilful is thereby superadded;
 and these are considerations which deserve attention.

Sir W. Blackstone observes that the reason as to
 unskilfulness in trades; " extends only to such
 trades in " the exercise whereof skill is required;"‡
 whilst the author of the ' Remarks' contends§ that
 ' It is not applicable, even to these;' that ' it is altogether
 ' inconsequent, as urged in favour of the statute in

* Rem. p. 274. + Ibid. ‡ Com. y. 1. p. 427, 428.

§ Rem. p. 75.

* question; and he relies upon the following observation of Adam Smith—"The institution of long apprenticeships can give no security that insufficient workmanship shall not be exposed to public sale. When this is done, it is generally the effect of fraud, and not inability; and the longest apprenticeship can give no security against fraud." But this remark of Adam Smith is foreign to the present argument, for the position that but for long apprenticeships there would be unskilfulness in trades, manifestly is not answered by the remark however just in itself, that the exposure for sale of insufficient workmanship is *generally* the effect of fraud.

There is another argument however in favour of this law which Sir W. Blackstone considers as going much farther and possessing more reason, viz. that "Apprenticeships are useful to the commonwealth, by employing of youth, and learning them to be early industrious, but that no one would be induced to undergo a seven years servitude, if others though equally skilful, were allowed the same advantages without having undergone the same discipline."* It is remarked, however, by Mr. Sedgwick that upon closer investigation, it will appear that this reasoning does not properly apply: 'If the question were,' says he, 'whether the statute ought to be repealed as to some, and held in force as to others? Or if the statute itself ordained that one individual should bind himself for seven years in the service of a master, while another of somewhat brighter capacity should exercise the same trade after having qualified himself by a few months' instruction; in this case, indeed, it might be well urged, that no one would be prevailed on to toil through the long period from adolescence to manhood to qualify himself for a trade, which another without such irksome and expensive preparation, might exercise with equal advantage. As the case at present stands,' he adds, 'the argument is wholly irrelevant.' But the difference between the cases supposed by the learned commentator and that put by the gentleman himself is not perceptible, for if particular individuals would be prevented from binding themselves for the long period of seven years, because that others might exercise the same trade after having qualified themselves

by a few months' instruction, which is the case that the gentleman states, it seems reasonable to conclude that the same individuals would be deterred from undergoing a seven years' servitude if others though equally skilful were allowed the same advantages without having undergone the same discipline, which is the case supposed by Sir W. Blackstone. Both cases (to me at least,) appear therefore, the same in effect. All laws must be framed to meet general cases. It would be impossible to decide in every, or in truth in any instance, what time would be requisite for the attainment of a due degree of skill in any line, because it would be impossible to form a correct opinion of the extent of the youth's capacity, the adaptation of his genius to that particular line of life, and the remissness or intenseness of his future application. These are things which disclose themselves in the course of his progress. But it seems clear, and indeed it is admitted in the very case which the author of the 'Remarks' puts, that those who would stand in need of a seven years' toil allowing a reasonable time for the masters profit would not consent to be tied up for so long a period, unless the regulation were general; the evident consequence of which refusal would be, that many would not devote the time necessary to acquire a knowledge of their particular line of business; and unskilfulness in trade would be the inevitable result.

Mr. Sedgwick also says,* that—' With respect to the chain of the proposition, on which so much stress is laid, that apprenticeships are useful to the commonwealth, by *employing of youth and learning them to be early industrious*; this will also, on more intimate research, appear to be not merely unfounded, but directly the reverse of the fact;' but he doth not support that assertion by any arguments when he adds that ' There is confessedly no art or calling of so difficult acquirement as to require seven years of unremitting application, or any thing approaching to it. If the apprentice by assiduity attain the knowledge of his particular craft, (as he easily may) in the course of the first or second year, he will naturally become desirous to practise it for his own emolument. This desire will aggravate the dislike which he will feel; (and which all feel)

* Rem. p. 276.

‘ to labour solely for the gain of another, this temper of mind will infallibly induce habits of indolence during the remainder of his service. When he is paid for the fruits of his skill and exertion, when he finds that skill and that exertion to be the measure of his earnings and means of subsistence, he is then brought to perceive the profitable purposes to which his time may be employed; he is practically made sensible of its value; and it is then only that he is likely to become industrious.’ Now in the first place, it is to be observed, that there are no trades, certainly not any which require skill in the exercise of them, of which an adequate knowledge can be acquired in one or two years; and with respect to his being permitted to practise for his own emolument only, as soon as his labour is productive of gain, it hath been already remarked that his master is entitled to derive a profit from some portion of that labour as a recompense for his instruction and loss during the initiation of the proficient.

As to the habits of indolence which such apprenticeships are said to induce, it must not be forgotten, that they are compellable by law to labour, and that the apprentice knows that he will be entitled to certain privileges over others in consequence of having served that apprenticeship. In truth, all the advantages and disadvantages attending the engagement are considered before it is entered into, and the person comes determined to submit to the irksomeness of his situation. It is a voluntary engagement, and he therefore is not likely to be so much dissatisfied with it as to give into habits of indolence, unless he is otherwise prone to idleness, and where that is the case, the power of compulsion which the master possesses, is salutary.

When the gentleman says, that ‘ it is then only that he is likely to become industrious, when he is paid for his skill and exertion,’ and argues that they ought to practise on their own account after one or two years learning, does he consider that they would be thrown upon the world at a period of life when they would be totally unfit to become their own masters, and that it would be highly impolitic that youth should be left to their own guidance and discretion at so volatile and unsteady a season. Such a licence it is believed would not much conduce to habits of industry.

CHAP. XV.

IN considering the private relation of marriage, Sir W. Blackstone takes notice of the statute 26th Geo. III. c. 33, whereby it is enacted, that all marriages celebrated by licence where either of the parties is under twenty-one not being a widow or widower, without the consent of the father, or if he be not living, of the mother or guardians, shall be absolutely void. "Much," says he, "may be, and much has been, said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages especially among the lower class, are evidently detrimental to the public, by hindering the increase of people, and to religion and morality, by encouraging licentiousness and debauchery, among the single of both sexes, and thereby destroying one end of society and government, which is *concubitu prohibere vago*.*" Now Mr. Sedgwick does not dispute that this law is beneficial in preventing the clandestine marriages of minors, but he contends† that 'as to any ill effect which this restraint may have on the lower classes, it is if not entirely chimerical, by no means of any real magnitude.' He argues that 'few among them are in a condition to provide for *themselves* before the age of twenty-one, much less for the expences which an early entrance into the married state infallibly brings with it;' and that 'those who do marry during that immature period too generally subject themselves to embarrassments which involve them in the end in indigence and ruin.' But if the solidity and application of the gentleman's observations were admitted, still they would not go any way towards proving that this restriction of marriage until twenty-one has not a tendency to hinder the increase of

* Com. v. 1. p. 438. † Rem. p. 285.

the people, and to encourage debauchery, which is what the learned commentator asserts. Mr. Sedgwick admits that 'every discouragement to marriage, operates as a check to population,' and that 'the more such discouragements are multiplied, the more vice and licentiousness, and all the miseries flowing from the illicit and irregular commerce of the sexes, will abound.' But he says, that 'the restraining statute in question, does not deserve to be accounted as an *evil of this tendency*.' It does not clearly appear whether it is meant to be admitted that it has the tendency alluded to, but that it is not an *evil tendency*, all circumstances considered, or that it has not *any such tendency* at all. Indeed it might be thought to have been meant that although it ought not to be accounted as an evil of *this tendency*, yet that it was to be accounted as an evil of some other tendency. The whole of the observations advanced, show however, that the latter interpretation cannot be the true one, although the expression of itself might be thought to imply as much. It could not be meant neither, that it has no such tendency at all, for it is admitted that every discouragement to marriage, (and this clearly is one) has this very tendency. The meaning therefore must be; that this tendency when all things are considered is not an evil one, and this conclusion is favoured by what the gentleman afterwards remarks—'Even assuming that with us population is repressed by any obstacles attending the marriage of minors, it were better repressed by these means, than by means of the dependence, distress, and involvement, too often entailed on the offspring of such marriages.'* But in this remark there is no force, for *non constat* that in such a country as ours where every industrious individual may procure employment, either that any such dependence, distress and involvement would be so entailed by such marriages among the lower class, or that they would have the effect of repressing population.

Sir W. Blackstone observes that it is upon the principle of an union of person in husband and wife that "a man cannot grant any thing to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would

* Rem. p. 286.

"only be to covenant with himself."* This reason however is disapproved of, by the author of the 'Remarks,' who asserts that 'It is the *identity of interest* rather than of *person* which our law should seem to regard, and which is chiefly respected by its regulations.† That gentleman however has not only not attempted to adduce a single instance or regulation in which our law respects the identity of interest, rather than of person, but has actually given other instances in addition to those referred to by the learned commentator himself, in which the determinations of the law have proceeded entirely upon the principle of an union of person, relying upon the principle laid down in Bracton that *vir et uxor sunt quasi unica persona quia caro una et sanguis unus*.‡

Sir W. Blackstone proceeds to observe, that "In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union. But in trials of any sort, they are not allowed to be evidence for or against each other; partly because it is impossible their testimony should be indifferent; but principally because of the union of person; and therefore if they were to be admitted to be witnesses for each other, they would contradict one maxim of law *nemo in propria causa testis esse debet*;" and if against each other they would contradict another maxim *nemo tenetur seipsum accusare*.¶ Mr. Sedgwick observes that 'this likewise must be understood with many *exceptions*,' from which it might be thought that the learned commentator had laid down this doctrine without an exception, but the fact is that having made the observation above transcribed, he immediately proceeds to point out certain exceptions.

The gentleman then quotes the following passage from Buller's Law of Nisi Prius—"Husband and wife cannot be admitted to be witness for each other, because their interests are absolutely the same; nor against each other, because contrary to the legal policy of marriage;" and then observes that 'in thus rejecting the testimony of the husband and wife, the law proceeds on the presumption

* Com. v. 1. p. 442. † Rem. p. 286, in a note. ‡ See Litt. sect. 291, Lord Coke's comment upon it and Bracton, loc. cit.

¶ Com. v. 1. p. 443. § P. 286, Ed. 93.

‘ of too great a bias on the minds of the parties whose
‘ interests are so interwoven, and not on the principle of
‘ a *union of person*, for this would forbid the receiving
‘ such testimony under any circumstances.’ But what
is the legal policy of marriage? It must be defined before
we can see whether their being witness against each other
militates against it. Now the learned commentator in-
forms us, that “The main end and design of marriage is to
ascertain and fix upon some certain person, to whom
the care, the protection, the maintenance and the educa-
tion of the children should belong.”* But this object
would not be defeated by admitting the wife to be an evi-
dence against her husband. With respect to their inte-
rests being absolutely the same, the learned commentator
himself, says, that the reason why they are not allowed to
be evidence for or against each other, is “partly because
it is impossible their testimony should be indifferent,”
and indeed a union of interests seems to be the necessary
consequence of the civil union of person.

* Com. v. 1. 447, 456.

CHAP. XVI.

WE have in the next place to defend certain passages in the commentaries, upon the subject of the relation between parent and child. After observing that the civil law would not suffer a parent at his death wholly to disinherit his child without a sufficient reason, Sir W. Blackstone says* that—"Perhaps this is going rather too far: every man has, or ought to have, by the laws of society, a power over his own property: and as Grotius very well distinguishes, natural right obliges to give a necessary maintenance to children; but what is more than that they have no other right to, than as it is given them by the favour of their parents, or the positive constitutions of the municipal law." 'But,' remarks Mr. Sedgwick, 'it is a proposition which must not be too literally received, that every man has, or ought to have a right over his own property. The right of every man over his property, is at all times subordinate to the duty which directs him in the use to be made of it.'† And after some other remarks of the like nature, he asks, 'If every act is justifiable which the law does not expressly and specifically interdict?' and if 'a moral and accountable being is not under the control of higher obligations, directive of that conduct which the public law of the state must, in the nature of things, leave wholly discretionary.'‡ Here again the gentleman does not argue against the true but perverted meaning of the passage extracted from the commentaries, for that passage does not import that every man has a moral right to dispose of his property, as his fickleness or humour may incline him; but that the laws of society ought to leave it discretionary; that those laws ought not, as the civil law did, restrain him in the exercise of his power over it. This is manifestly the meaning of Sir W. Blackstone, for, after saying that the civil law went too far in imposing such a

* Com. v. 1. p. 448. † Ram. p. 290. ‡ Ibid. p. 291.

restraint, he adds, that "every man ought to have *by the laws of society*, a power over his own property," which evidently merely imports that the laws of society, ought to leave him free of their interference, in the disposition of that property. And consequently there, is not the smallest pretence for inferring the learned commentator's meaning to have been that man was not under any moral obligation to dispose of his property, according to the ordinations of equity and justice. But it was necessary that the gentleman should in transcribing the passage, have omitted entirely all that relates to the *laws of society*, and also that he should in the argument have converted the word *power* into *right*, in order to give his remarks any appearance of plausibility.

Mr. Sedgwick continues to observe,*—'With respect to the principle laid down by Grotius, that NATURAL RIGHT obliges to give a NECESSARY maintenance to children and no more; it must be remarked, that there are two kind of necessities,—the necessities of life, and the necessities of our condition in life. Natural right, or more correctly speaking, natural duty, obliges every parent, in the first place, to bequeath such a provision to his children; as his own particular circumstances may admit; and, in the next place, to assort that provision to the mode in which they have been educated, to the circle in which they have been accustomed to move, and to the style of living in which they have been bred and habituated: regard should likewise be had to the profession in which they have been placed; the rank assigned to it in society, and the class of persons to whom it may lead; perhaps compel them to associate.' That parents ought to be guided in the disposal of their fortunes after their deaths, by an attention to the matters and considerations which the gentleman hath mentioned, and that children may reasonably expect that such an attention will be paid, is admitted: but it cannot be allowed that the parent is under any *natural* obligation to make such a provision for his children, and the question is, what provision it is the *duty* of the parent to make, and the child has a *right* to by NATURE. Now it is only under the laws of society, and not by virtue of any natural right that

* Rem. p. 291, 292.

any man acquires a permanent exclusive right of property, in those things in which he has the power of disposing. It should seem, then, that no child can have a *natural* right to such property, and that no *natural* duty would be unobserved, if the parent should totally disinherit his child.

The learned commentator observes, that—"Our law has made no provision, to prevent the disinheriting of children by will: leaving every man's property in his own disposal; though perhaps it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence."*—But in order to show that the legislature in this and similar cases, wisely abstains from interposing its authority, the author of the 'Remarks' observes. 'If, for instance, the duty we are at present explaining were made compulsory by public laws, the potent means of restraint, together with all that legitimate influence which property bestows, would be withdrawn from the parent. That interest on the other hand, which comes in aid of all the other motives to filial obedience and subordination, would be destroyed on the part of the child. The latter would not be withheld from indulging his wayward propensities by any fear of being cut off from such a portion of inheritance as might supply his future occasions; while the former would be constrained to minister to his profligacy, by virtue of that edict of the civil power, which enjoined him to bequeath such a patrimony as is suited to the *real state of his fortune*, without having provided against contingencies which may render such patrimony a source, not of real service, but of absolute ruin to the child in whose favour it is obtained.† These observations of Mr. Sedgwick would have been applicable and just enough, if the learned commentator had said that the parent should be bound to leave such a patrimony as might be *'suited to the real state of his fortune'*, which would be compelling persons of large fortunes, to leave their children in a state of affluence; but as it is only a *necessary subsistence*, of which he speaks, in other words such a provision only, as will enable the children by means of it to subsist; the observations, that if the duty

* Com. v. 1. p. 450.

† Rem. p 292, 293.

were made compulsory, that interest which comes in aid of all the other motives to filial obedience would be destroyed,—that the father would be constrained to the minister, to the profligacy of his children,—that the patrimony to be left, would be rendered a source of absolute ruin; and all the other remarks which the gentleman has advanced upon this subject—are without any application whatever; and the circumstance of his having offered *irrelevant* arguments, shows that none were to be found by which the learned commentator's propositions could be attacked with any success.

Treating of the duty of parents to their children, as to giving them an education suitable to their rank in life, Sir W. Blackstone observes, that “The municipal laws of “most countries seem to be defective in this point, by “not constraining the parent to bestow a proper education “upon his children,” and that “the defects of our laws “in this particular cannot be denied.”* It is questioned however by Mr. Sedgwick, whether we do not reckon too much upon the efficacy of positive laws, when we lament the want of their interference on this head. ‘In a small ‘and rising republic,’ he says, ‘they may perhaps watch ‘to good purpose over national education; but there is ‘a certain posture of affairs, a certain period in the progress of civil convention, in which such over anxious ‘attention on the part of the state, would rather embarrass than benefit the general interests. At such a period, ‘the business of education is best confided to the discretion of parents and guardians, and to the influence ‘of pride, shame, emulation, and private interest over ‘the individuals themselves.’† But the most material information this gentleman hath neglected to disclose, which is, what that certain posture of affairs—that certain *period in the progress of civil convention*—is, in which it would be impolitic that those laws should exist, which, in a small and rising republic are admitted to watch to good purpose over national education. This information we should have been favoured with, and also the reason why they would have an evil tendency in one period of the progress of civil convention, and have a salutary effect in another; for it is not enough that we are left to guess at those mat-

* Com. v. 1. p. 451.

† Rem. p. 294.

ters. With respect to the business of education being left to the discretion of parents and guardians, it is not meant that the state should take the direction of those matters out of their hands, but merely that it should prevent their neglecting to give them a suitable education.

It is said also,* that 'In an opulent and enlightened community there never yet was and in all likelihood there never will be, wanting, a sufficient number of seminaries for the teaching and training up its youth; and that 'None who are desirous of information in any branch of science, mechanical, classical, or moral, can be doomed to ignorance from the want of tutors able and at hand to instruct them.' All this is very true, but if it can be applied at all, it will be found to be against the very reasoning which it is brought to support, for the question is not whether the state ought to provide seminaries and tutors, but whether parents and guardians ought not to be compelled to avail themselves of the existence of those facilities in the way of education. If indeed there were any deficiency of seminaries and tutors, it would be a most unjust law which should subject parents and guardians to penalties for not educating their children, but as there are a sufficient number to be found, there can be no reason why those advantages should be neglected.

'It is difficult moreover,' it is also remarked,† 'to define what is meant by a *proper education* as applied to millions of men differing in their circumstances, views, means, and mode of life. The power of enforcing such a duty would furnish a pretext for such arbitrary and universal inspection into the extent of private revenues and the schemes of domestic arrangement, as would be utterly intolerable.' But in truth, no such difficulty or inconvenience as Mr. Sedgwick supposes, would exist were the learned commentator's suggestion adopted for such an inspection would be no more necessary than it is difficult to define what is meant by a *proper education*, the learned commentator a few lines above having said that it is the duty of parents to give them "an education *suitable to their station in life*,"‡ and to ascertain

* Rem. p. 294, 295. † I. id. p. 295. ‡ Com. v. l. p. 450.
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what that station is, no arbitrary inspection into private revenue would be required.

It is in a note* urged against the learned commentator, that he has said rather morosely, that "The rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family. Yet in one case, that of religion, they are under peculiar restrictions."† The restrictions alluded to are those imposed by the statute 1 Jac. I. c. 4. and 3 Jac. I. c. 5, to prevent the spread of popery and the author of the 'Remarks' observes that 'These restrictions however are not of so promising a complexion as should incline any enlightened and liberal mind to favour their extension, or to wish *this option* to be at all curtailed, whether to the rich, or to any other class.' Perhaps not. But the restrictions which the learned commentator supports, are not an extension of the restrictions occasioned by the above mentioned statutes. He argues indeed that that option, which parents and guardians now possess of wholly neglecting the education of those who are committed to their charge might be advantageously curtailed; but, by *education* he does not mean that they should be brought up, or be restrained from being brought up in any particular description of religious faith—not that they should receive an education suitable to any particular creed—but *suitable to their station* in life.

Mr. Sedgwick then cites the following part of the learned commentator's observations upon the duties of children to their parents—"The *duties* of children to their parents, arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after."‡ So far the gentleman has transcribed from the Commentaries, and then contends§ that the origin of these duties does not spring from a principle of *natural justice*; that 'no tie of consanguinity however near, can exact homage to vice and folly,' that 'we are not made to honour imbecility, or to be grateful for prosecution;' that 'were the duty

* Rem. p. 296. † Com. v. 1. p. 297. ‡ Com. v. 1. p. 453.

§ Rem. p. 298, 299.

‘ of subjection and reverence imposed upon us by a *principle of natural justice*, they will in such case be due, independently of that worth, and of those qualities, which should give a title to them.’ Now if the learned commentator had meant that the mere tie of consanguinity gave rise upon a principle of natural justice to the duties of children, it would be very readily conceded that the inaccuracy of his opinion upon this subject had been clearly demonstrated by the above and the other remarks which Mr. Sedgwick hath advanced; but I apprehend, that we are bound to suppose, that the learned commentator (who has previously mentioned in what the duty of parents towards their children consists,) means to assume that the duty of the parent is discharged, and that in return for the benefit which the child has derived from a discharge of that duty his own relative duty arises upon a principle of natural justice and retribution. The latter part of the sentence which hath been only partially transcribed in the ‘Remarks’ favours that conclusion; for the learned commentator adds*—“*They who protected the weakness of our infancy* are entitled to our protection “*in the infirmity of their age, they who by sustenance and education* have enabled their offspring to prosper, “*ought in return to be supported by that offspring, in case they stand in need of assistance.*” Now most certainly it is the duty of children upon a principle of natural justice and RETRIBUTION to make those returns which the learned commentator hath mentioned, for protecting their weakness in infancy, and for the sustenance and education which has promoted their prosperity.

Mr. Sedgwick says†—that “*To abstain from what is another’s—to restore what we have borrowed—to render every man his own—to refrain from wilfully injuring those by whom we were never injured—these are in the number and class of those duties which natural justice enjoins.*” That gentleman surely will not refuse to admit what is indisputable, that—to show our gratitude for benefits received, is also of the number and class of those duties, and if that admission be made, another which must necessarily accompany it is, that those returns from children to their parents of which the learned commentator speaks

* Com. v. 1. p. 453. † Rem. p. 298.

are due upon a principle of natural justice and retribution. In truth the word retribution signifying a *return*, raises a necessary implication in the passage quoted, that the duty of the parent must be understood to have been discharged.

The author of the 'Remarks,' says also* that 'natural justice may sometimes support, but does not create those duties;' that 'they arise *ex alio fonte*;' that 'they are of another order and are to be found in another code.' But he forgets to tell us what it is, (in cases where he allows that they do exist) that does create them? Whence they spring? What their order is? And in what code they are to be found? Sir W. Blackstone moreover is speaking *generally* where it may be supposed that parents do discharge their duty, and his observations are not to be refuted by arguments drawn from *particular cases* where that duty is assumed to be neglected. So one of the articles in the decalogue dictated by the great fountain of justice himself, is without any exception or restriction—"Honour thy father and thy mother." But if Mr. Sedgwick were to comment upon this article in the same manner that he has upon the passage in the Commentaries, he would say, No! 'We are not made to honour 'imbecility or to be grateful for persecution!'

CHAP. XVII.

THERE remains unnoticed only one subject upon which we have to defend the sentiments of the learned commentator against the criticisms of the author of the 'Remarks,' and that is with respect to the effect of corporations—"These artificial persons," says Sir W. Blackstone† "are called bodies politic, bodies corporate, (*corpora corporata*), or corporations of which there is a great variety subsisting for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which if they were granted only to those individuals by which the body corporate is composed, would upon their death

* Rem. p. 299.

† Com. v. 1. p. 467.

“ be utterly lost and extinct.” Now Mr. Sedgwick admits, that corporations founded for the encouragement and support of religion and learning are essential and full of utility. But he adds,* ‘ How far in affairs of *commerce* the same policy is expedient; whether it is in the same manner required towards, or does at all conduce to, its *advancement*; and whether *private statutes* and *bye-laws*, which may be useful to regulate a seat of *learning*, are essential to the government of *trade*, may admit of much doubt.’ He contends too, that—‘ In all commercial concerns, that equal liberty, which, under a free government should be dispensed to all, forbids the creation of any chartered body politic invested with advantages denied to any other trading part of the community.’ That it would be unjust towards individuals, and highly prejudicial to the interests of the community, if trade in general were not open to all under equal privileges is admitted; but it is not difficult to suppose cases where it would be to the advantage of the public that corporations should be established, inasmuch as many sources of foreign trade and commerce have been and may again be opened by an incorporated company, requiring a capital so large that the fortune of an individual would have been incompetent—speculations in which the persons composing that corporation never would have hazarded their property unless some advantages over other traders had been granted to them. The public interests are benefited by such an increase of trade, and consequently it is politic to grant to a few persons certain privileges rather than that the public should not obtain those benefits. It is not true therefore, that ‘ The advantages such as they were which at first attended corporations have long ceased to exist.’† With respect to ‘ *private statutes*’ and ‘ *bye-laws*,’ it will be sufficient to observe; that by the law of England, no trading company is allowed to make bye-laws, which may affect the king’s prerogative, or the common profit of the people, unless they be approved by the chancellor, treasurer, and chief justices or the judges of assize in their circuits: and even if they be so approved, still, if contrary to law they are void ‡

* Rem. p. 302.

† Rem. p. 303.

‡ See Bl. Com. v. 1. p. 476, and the references there made.

Notwithstanding, the author of this excellent essay, whom we are now permitted to state to be the very learned editor of the last edition of *Bacon's Reading on Uses*, has corrected the press, for this part of the work, we lament that the following errata have occurred.

- P. 26, line 6, for 'which it is seems,' read *which is, it seems*.
 .. 28, last line but 2, for powers read power.
 .. 37, .. 20, read alluded to.
 .. 39, line 22 and 23, omit the *commas* after the words *to* and *imagination*.
 .. 41, .. 1, read *constitution*,
 .. 42, .. 22, for *complexities* read *complex ties*.
 .. 43, last line but 4, for *is* read *its*.
 .. 55, line 12, for *stratagem* read *as a stratagem*.
 .. 60, .. 17, instead of, if it, read *of it*.
 .. 63, .. 33, for *consideration*, read *condition*.
 .. 85, .. 30, for this read *its*.
 .. 91, .. 4, strike out the inverted comma after *faculties*.
 .. 95, .. 12, read *the right*.
 .. 104, .. 27, for *right* read *rights*.
 .. 108, .. 22, place an inverted comma before '*this*.
 .. 108, .. 28, place an inverted comma after *contributions*' also.
 .. 119, last but 2, instead of *flavente*, read *juvante*.
 .. 122, .. 29, for *is* read *are*.
 .. 135, .. 10, for *not given*, read *given*.
 .. 135, .. 26, for *were* read *where*.
 .. 137, .. 4, & 5, place the words (with respect to an original contract at least) between brackets.
 .. 142, .. 11, for *expressed* read *expresses*.
 .. 144, .. 9 and 15, strike out the *commas* between the words *treasure* and *trove*.
 .. 144, .. 14, for *usage*, read *usage*.
 .. 157, last but 3, for 'he' read *Mr. Sedgwick*.
 .. 159, .. 25, for *Kaines*, read *Kaimes*.
 .. 160, .. 38, for *Kaines* read *Kaimes*.
 .. 167, .. 35, read *or a rude*, &c.
 .. 190, last but 2, place a period after *bound*.
 .. 191, bottom of the page for *Tab. Contents*, read p. 153, to p. 161.
 .. 206, last line read *its* enactment.
 .. 208, .. 11 and 12, place two inverted commas before *dwelt* and after *alms*.
 .. 212, .. 13, for *describing* read *ascribing*.
 .. 212, 21 and 22, strike out the words "*and his observations extend to all aliens.*"
 .. 212, .. 35, strike out the comma after *feudal*.
 .. 215, .. 35, for *disposing* read *deposing*.
 .. 216, .. 30, for *equality* read *quality*.
 .. 218, .. 29, for this read *his*.
 .. 240, .. 3 and 4, instead of 'the minister' read *administer to*.

ELEMENTS OF CONVEYANCING, to which is prefixed an *Essay on the Rise and Progress of that Science, and cursory Remarks on its Study and Practice.* 6 vols. Royal 8vo. price 7l. 2s. in boards. London: Printed for W. Clarke, and Sons, Portugal-street, Lincoln's-inn.

LONG as conveyancing has been considered, in the practical departments of the law, as a distinct science, no attempt, that we know of, was ever made till the appearance of the above work, to reduce into method and system the various statutes, resolutions, and principles of jurisprudence on which it is founded; much less to point out the origin, reason, and technical construction of them, with a view of facilitating their application to practical use. Indeed, when it is recollected how large a portion of our present code of laws, owing to the great increase and diffusion of commerce and wealth in this country, relates more or less to the enjoyment and transfer of property, it is, perhaps, less a matter of surprise that no such attempt should hitherto have been made, than that a task so laborious, should now have been undertaken by any one of sufficient abilities and legal information to perform it even to the extent which has been done by the author of the work before us. Such a work, however, designed and completed by one of the discrimination and ability which Mr. Barton has acquired the reputation of possessing in this branch of the law, (and which in our opinion the present work will in no respect diminish) must at all times be considered as an invaluable present to those whose studies or practice may be directed to the pursuit of this department of the profession.

The author has distributed his subject into **FIVE** general divisions or books, comprising,

I. *The several Kinds of real Property.*

II. *The Estates and Interests which may be had in such Property.*

III. *The Means by which such Estates may be transferred from one Person to another in the Life-time of the Owner; and*

IV. and V. *The Manner in which they will descend upon the Owner's Decease.*

In the **FIRST** of these books are considered the natures of the several species of real property; under the heads of *Land—Advowsons—Tithes—Commons—Ways—Offices*

—*Dignities—Franchises—Rents—and Annuities*; in which the author adduces at the same time the legal enjoyment of each, and the means by which they may respectively be destroyed.

The SECOND book treats of estates in *fee-simple*—in *fee-tail*—for *life*, (including *Curtsey—Dower* and *Jointure*,) Estates for *Years*—at *Will*—and by *Sufferance*—Estates by *Copy of Court-roll*, and other *Customary* Estates—Estates upon *Condition*, and by way of *Mortgage*—Estates in *Remainder* and *Reversion*—and Estates in *Joint-tenancy*—*Coparcenary* and in *Common*—and concludes with the doctrines of *Uses* and *Trusts*. These several estates and interests are also considered; 1. In respect of their general natures and properties; 2. How they may be respectively created; 3. The incidents attendant upon their enjoyment; and 4. The means by which they may be respectively destroyed.

The THIRD Book treats of the natures and operations of assurances by executory contracts—*Froffment—Gift—Grant—Exchange—Partition—Release—Confirmation—Assignment—Deceazance—Covenant to stand seized—Bargain and Sale—Lease and Release—Declaration of Uses—Appointments and Revocations—Fine—Recovery and Surrender*.

The FOURTH Book treats in the same manner of the Law of *Devises*; and,

The FIFTH Book of the Law of *Descents*.

Under the foregoing heads the author professes to have endeavoured to collect and reduce into a systematical form, all that is to be found in the statutes, reports, and other legal repositories upon the various parts of the science of Conveyancing; and moreover to have attempted to give the reason of every rule and doctrine of importance in the science; to illustrate them by the leading cases to which they have been applied, and to notice the legal and equitable inferences to be deduced from them. And to the whole is subjoined an *Appendix* of Cases determined whilst the work was at press, an alphabetical table of the names of the cases cited, and a copious index to the principal matter.

A work of such magnitude, and comprizing such a vast variety of abstruse and important doctrines of law, it were impossible consistently with our other engage-

ments to comment upon in detail, or even to examine *throughout* with that attention and care which would be requisite to enable us to point out with precision the greater or less degree of accuracy, with which the several subjects it embraces have been discussed. From the best examination, however, which we have been able to give it, we can venture to assert, (and on account of the great expence, labour, and anxiety which it must have occasioned the author, we are glad to be enabled to do so,) that it appears to us to be executed, with a few exceptions, in a manner which redounds in no small degree to the credit of the author's legal abilities and unconquerable industry, and must, we think, prove a most acceptable and valuable addition to the library of all those who practice in this particular branch of the profession; and more especially those to whom on account of their distance from the metropolis or other reasons, it may be inconvenient to apply at every turn for *viva voce* assistance. The index appears to us to be as complete, in point of form, as we remember to have seen annexed to any legal publication; a matter which will be deemed by every practitioner as of the highest importance, and cannot fail to add greatly to the general utility of the work.

If we were to select any part of the work, as in our opinion less deserving the approbation we have bestowed upon it than the rest, it would be the SECOND and FOURTH book, in both of which we think that many of the cases (particularly those on the subject of *Conditions* and Ecclesiastical Leases) are given more at length than the subjects under consideration demanded. In truth we are disposed to hope that the author on a future revisal, will discover that some other parts of the work may be compressed, without detracting in any degree from the merit or utility of the work; its present magnitude and price being such as to carry it, we fear, beyond the reach of many to whom it might be eminently useful.

Mr. Barton has prefixed an Essay, entitled, "Cursory Remarks on the Study and Practice of Conveyancing;" which contains also a course of reading recommended by the author to such as would become proficient in the science, including strictures upon some of the principal books written upon the different parts of the subject of conveyancing. Many of these remarks are well

worthy the attention of every young practitioner; and we are happy to say that they bear a very pleasing and honourable testimony, to the high sense of honour and integrity, with which the author appears to be impressed, on the subject of professional practice.

From this part of the work we shall make an extract, which may be of service to the younger class of students. It is that part of the author's Essay on the Study of Conveyancing, in which he treats of the books already written upon the subject, and which he recommends for general perusal or frequent consultation. On this head it must be admitted that his choice is ample, perhaps more extensive than will ordinarily be deemed necessary, especially by those who shall undertake steadily to peruse Mr. Barton's own work, which may be considered as a summary extract and collection from all of them.

In one point of view this *catalogue raisonné* of the authors, most useful to the student of conveyancing is a sort of necessary appendage to the work. For it is almost an index of the authors principally cited; an account of the sources from which the author has collected and methodized his own information; and, if he has done nothing more than select from them, if he has culled with taste and judgment the stores of their separate hives, he has executed a work of lasting and general utility. He performs the office and merits the praise of the bee, *grata carpentis thyma, per laborem plurimum*.

In doing this, it must be admitted, and Mr. Barton himself confesses, that he has been by no means sparing in making extracts almost literally from all or the greater number of these writers, and, without it, perhaps the labours of one man, in his whole life, would not have been sufficient to have produced such a work. To pursue our *simile*, or rather to adopt another arising out of it, the honey being collected and stored in separate hives by the industry and original labours of his predecessors, Mr. Barton has collected from each, and of each kind, that which suited most his own purpose; he has mixed it up with his own composition very much in the state which he found it; but to have set about extracting it by his own labour, would have been beyond his powers, he would have been exhausted in the toil, he would have sunk with fatigue in the very spring-time of his exertions, and would

not have survived to deposit his stores in security and order for the service of those who were destined to reap the fruits of his labours. The sentiment of regret which now rises in our mind at the imaginary loss of so much labour, brings to our thoughts an author to whose writings Mr. Barton appears to us to be peculiarly indebted. We mean the great, the ingenious, the able, the learned, and the laborious Baron Gilbert, the author of Bacon's Abridgment. This writer passed a whole life in methodizing, abridging, and arranging in one general repository, in alphabetical order, a vast variety of excellent treatises on every subject of the law; which at last he lived not to complete, and they were published by another; by *Bacon*, under whose name the whole has been several times reprinted. A remarkable instance, how frequent it is that the object of our lives is disappointed; that while one performs the labour another gains the profit; and that, to return to our bees, it happens with the race of man as among the insect youth, who frolick in the spring and toil through the summer, that they are cut off in the harvest of their hopes; and may exclaim with the little body politic of murmuring labourers who dwelt in the hives of *Hymettus*, and sipped honey from the flowers of *Hybla*, *Sic nos non nobis mellificamus apes!*

But to return to Mr. Barton. In his directions for study he recommends for general reading almost all of the antient and comprehensive treatises upon the law, a task which, we fear, no one but an enthusiast in the pursuit of science, will ever undertake, or, if he undertakes it, be able to complete. He who is bitten with this fury, will read every thing and will probably profit much; but we do not expect it from the practical conveyancer, much less from the practising attorney; and we should ourselves be contented with recommending to the student an immediate perusal of the works of Blackstone, Reeves, Preston on Estates, Hargrave and Butler's edition of Coke's First Institute, Fearne, Fonblanque, Buller, Cruise on Fines, Saunders on Uses, Bacon's Abridgment, (to supply occasional information on collateral subjects,) and lastly, as a book of regular perusal, and of frequent reference, this work of Mr. Barton's. But, if an attorney's clerk in the country, at the hours which he

can spare from his ordinary business, will diligently peruse and frequently study, in the five years of his probation, this work alone, with Blackstone's Commentaries, we shall not be afraid, if he add to it prudence and acuteness of mind, to entrust him with the management of a pretty large conveyancing business. This we would require of him till a better work shall be published, of which there is no promise. But we recommend him not to stop there, but to proceed onward with diligence and courage, and as Cæsar thought nothing done, till nothing was left undone, we advise him to think he has studied nothing, till he has no longer time to study any thing. We proceed now to make our extracts.

Mr. Barton first recommends a good law library, and the study of the following books, of which he gives a character, such nearly as may be found in *Reeves's History of the English Law*, and the *Bibliotheca Legum Angliæ*. Amongst the writers on natural law, he enumerates *MACINTOSH* as being familiar to every one. This is rather unfortunate for Mr. Barton as well as the profession. As a lecturer, the name of *Maskintosh* will be remembered with admiration, but excepting an introductory lecture, which is an example of eloquence, and truly fine writing, that stamps his character as an author, and makes us only regret, that he has written no more, we have nothing extant on the laws of England, or of other nations, by the *Recorder of Bombay*.

He, (Mr. Barton) then notices *Blackstone's Commentaries*, *Glanville*, *Bracton*, *Britton*, *Fleta*, *Hale's History of the English Law*, *Reeves's History of the English Law*, *Littleton's Tenures*, *Coke's first Institute*, *Gilbert's Tenures*, *Dalrymple's Feuds*, *Sullivan's Lectures*, *Wright's Tenures*, *Doctor and Student*, *Finch's Law*, and *Noy's Maxims*; and then proceeds to the more modern writers, of whose labours we shall let him speak for himself:

“The student by this time, it is presumed, has acquired a sufficient portion of general law learning, upon which to ground his study of any particular branch of the science; it will now, therefore, be proper for him to turn his attention to such authors as have treated of Conveyancing alone, in which the principles applicable to that branch of the science will be found more distinctly explained than could be expected in treatises of a general nature.

"Preston's Essay on the Quantity of Estates, may be read with advantage, as an introductory work on the Nature and Properties of Estates.

"This treatise was composed by the author at an era of his professional studies, at which few men possess more than a mere general idea of a science, of which that gentleman evidently possessed a very considerable portion.

"This is in truth, the only book which contains any thing like a methodical digest of the law upon the subject of which it treats, and when it has received those improvements which the great legal abilities of the author, (combined with the extensive practice to which he has since attained,) will naturally suggest to him, it will probably be entitled to rank amongst the first elementary treatises with which the profession has of late been favoured.*

"Watkins' Principles of Conveyancing, will also furnish the student with a very accurate though cursory view of the modern doctrines on the science of Conveyancing, so far as relates to the nature and properties of estates and interests, and of the assurances by which they are usually transferred from one person to another. And had that gentleman pursued his inquiries to an extent of which the subject is capable, the author of the present sheets, would have conceived it his duty to have supposed the publication of the ensuing volumes as unnecessary and useless.

"Bacon on Leases, is referred to by Sir William Blackstone, for the very curious and diffuse learning relating to leases, and terms for years, which is there given 'in a perspicuous and masterly manner, being supposed to be extracted from a MS. of Sir Geoff. Gilbert,' 2 Black. Com. 323. n. y. Till lately this valuable treatise was to be found only in the 'New Abridgment of the Law,' but it is now published in a separate form with the addition of new cases, by Mr. Gwillim.

"Watkins on Copyholds may be next taken in hand by the student. A good treatise upon the subject of copyhold tenure, was long a desideratum in the profession: it has at length however been supplied by this author in a manner which leaves little room for further investigation.

"Powell on Mortgages, is a book to which I would wish to call the student's particular attention; not only on account of the scientific and able manner in which the learning upon the subject is discussed, but because the law relating to mortgages, has, in its various ramifications, a very intimate connection with almost every other branch of the science of Conveyancing; and in order to show this connection, and render the treatise as

* We are happy to add our testimony to Mr. Barton's, as to the merits of this work. *Rev.*

generally instructive as possible, the author, in collecting the cases upon the subject, has so stated them (where they admitted of it) as to show not only their immediate relation to the particular law of mortgages, but their principles and tendency with regard to the laws of property in general. The author has, indeed, in this treatise, contrived to introduce more general law than is to be found in any other single treatise upon any legal subject.

"Ferne's Essay on the Learning of Contingent Remainders and Executory Devises. This essay, as it is modestly termed by the author, is the most profound and masterly investigation of the curious and intricate doctrine upon which it treats, of which any science, perhaps, can boast, and for which every one who practises in this branch of the profession, must ever feel himself under infinite obligations. It shows the author to have been possessed of a vigour of conception, and powers of discrimination, beyond what ordinarily fall to the lot of human nature; and fortunately for the student (who needs every inducement to enter upon with ardor, and persevere in with steadiness, so intricate a subject,) the classical elegance of the author's diction, and the spiritedness of his language, are such as to captivate his attention at the same time that the acuteness of his observations will claim his admiration.

"Saunders on Uses and Trusts, deserves also the student's perusal, not only as being upon a part of the law on which the theory of modern conveyancing is principally founded, but as forming a comprehensive and systematic treatise upon the subject; in this book the account given of the doctrine of uses, as it stood before the stat. of 27 Hen. VIII. is particularly interesting.

"The Essay on Uses by Mr. Cruise, contains also a perspicuous and accurate summary of the doctrine of uses, which may be read with advantage after the preceding treatise.

"The doctrines contained in the books hitherto enumerated, are in general more particularly applicable to property of a corporeal nature; it will not be amiss, therefore, for the student to apply himself a little to the further acquisition of such legal incidents as relate to incorporeal hereditaments; the chief of which are rents, advowsons, and tithes.

"The doctrine of rents is perspicuously elucidated in a treatise on that subject attributed to the late *Ld. Ch. Bar. Gilbert*. And on the subject of advowsons and tithes, sufficient for the student's present purpose will be found in the *Ecclesiastical Law* of *Dr. Burn*; of which a new edition with the requisite corrections, has lately been published by *Mr. Fraser*.

"Personal property is also now become an object of no mean

consideration, and as frequently the subject of a conveyancer's attention as real property itself. This is, in many instances, subject to peculiar rules of law not applicable to things of a real nature; but as there are no treatises exclusively on this species of property, the student must content himself with gathering such information respecting it, as he can collect from treatises written upon those subjects with which it is most nearly connected: amongst these may be named Toller's Law of Executors, Roper on Legacies, Cooke's Bankrupt Laws, Park's Law of Assurance, Sir William Jones's Law of Bailments, Plowden on Usury, Hunt's Law of Annuities, and Hullock's Law of Cests. These books possess various degrees of merit, but are all of them capable of affording a considerable portion of information upon the subjects to which they respectively relate.

"The student having now acquired a sufficient knowledge of the nature of the different species of property; and the estates which may be had in them, may proceed to consider the injuries of which they are susceptible, together with the means by which such injuries may be redressed: an investigation which will properly include so much of the particular jurisdiction, and general practice of the courts where those matters are cognizable, as relates to the subject of the ensuing Elements.

"In pursuing these inquiries, the student will meet with assistance from Fitzherbert's *Natura Brevium*, Booth on real Actions, Gilbert on the Law of Dower, Gilbert's Law of Ejectment, Gilbert's Laws of Distress and Replevin, Sellon's Practice of the Courts of King's Bench and Common Pleas, Burton's Practice of the Law Side of the Court of Exchequer; all of which are confined to the jurisdiction and practice of the courts of Common Law. Those which have for their subject the jurisdiction and practice of our courts of Equity, are Gilbert's *Lex Pretoria*, Mitford's Treatise in Equity, Francis's *Maxims*, Treatise of Equity, with additions, by Mr. Fonblanque, Chancery Register, with additions, by Mr. Wyatt, and Fowler's Equity-Side of the Exchequer.

"After the student has acquired such a knowledge of the jurisdiction and proceedings in the different courts of Law and Equity, as to enable him to perceive what tribunal is calculated to afford the most speedy and effectual redress for any given injury, under the actual circumstances of the case, he may proceed to the consideration of the Nature and Operation of the various species of Common Assurances by which the different kinds of estates, and interests in real property, may be transferred from one person to another.

"The most complete and valuable book upon this subject is the *Touchstone of Common Assurances*, in which the author

appears to have endeavoured to collect the substance of all the statutes and resolutions of the courts relative to the law of Common Assurances, which were then in print: and references to the later authorities upon the same subject, together with other valuable additions, have since been added by Mr. Hilliard, to whom the profession is much indebted for the industry he has displayed on the occasion.

"Perkin's Treatise on Conveyancing, is a book which it would be improper to pass unnoticed, because commonly recommended to be read by students, and, according to Hargrave, it ought in general, on account of the learning and ingenuity displayed in it, to have considerable weight on the subjects of which it treats; the same epithets are also given it by Lord Coke, in his Pref. to 10 Rep. One, however, who wrote soon after Perkins, describes him to be a man who thought rather subtly than soundly, Fulb. Par. 40, a (and see Fulb. Prepar. 28, a); and as the substance of the whole of it is inserted in the Touchstone, and that in a more methodical order, I do not see the necessity of the student's employing any of his time upon this uncouth author.

"Powell's Essay on the Law of Contracts and Agreements, is a book which the student should not fail to read in the early part of his attention to the Law of Common Assurances, as it investigates, in a scientific and masterly manner, the principles of a subject which includes 'every change and relation of private property, and consequently furnishes the principal subject on which all equal and equitable jurisdiction on the subject of deeds and common assurances is exercised.'

"The Essay of the same gentleman on the Learning of Powers, contains likewise a systematical arrangement of the cases to be found in the books upon the law relative to the nature, origin, properties, and execution of powers, in which that abstruse subject is considered, and the principles by which it is governed are explained with the same ingenuity and ability which characterize the other writings of that able conveyancer.

"An Essay on the Learning of Devises, by the same author, is also entitled to the student's attentive perusal, on account of the most essential points relative to the doctrines respecting the framing a Devise; and the accidents to which it is incident in its ambulatory state, (i. e. before its consummation by the death of the devisor), are collected and explained in a more regular and scientific manner than they are elsewhere to be met with. The doctrine of the construction of devises after their consummation, is, however, still wanting to render the work a complete treatise on the subject of wills; and though it was once in the author's contemplation to have composed a volume on that subject, it is much to be lamented that the great assiduity em-

ployed by him in elucidating so many diffuse subjects of law, added to the great influx of business, which the abilities and knowledge displayed by him in those investigations occasioned, has now for ever prevented his carrying that design into execution.

“For want of the work last alluded to, the student must content himself with procuring what information he can meet with in Gilbert’s *Law of Devises*. The *Treatise on Wills* contained in Burne’s *Ecclesiastical Law*, and that by Swinburne, which, though it contains by far the most learned and complete investigation of the general subject of wills that we are at present in possession of, is nevertheless but little adapted to the purposes of an elementary treatise, and less calculated, from the quaintness of its language, to allure the attention of the juvenile student.

“The same may be said of Wentworth’s *Executors*; in the room of this, however, the student may substitute a late treatise on the same subject by Mr. Toller, which is spoken of, by very competent judges, as doing great credit to the author’s learning and abilities.

“Watkin’s *Essay on the Law of Descents* is a very valuable treatise on that very intricate and important subject, and, with the Chapter of Descents contained in the *Tenures of Gilbert*, will furnish the student with all the information upon this head which he need be solicitous to acquire.

“Bridall’s *Ars Transferendi Dominium*, though a book not often met with, contains some very useful materials for the student’s legal reflections.

“After the student has gone through the preceding course of reading, little else will, I trust, remain to be done previously to his openly professing to practice the science he has thus industriously endeavoured to become master of, than to render familiar to himself the facts and circumstances of the principal, or, (as they are usually styled,) the leading cases; and the provisions of the principal statutes, passed or determined on the subject of Conveyancing; and as he will find this of infinite use to him in the very earliest stage of his practice, I shall here endeavour to enumerate, as far as my recollection will enable me, the cases of this description, though not perhaps in the same order as the subjects to which they relate will occur to him in the preceding course of reading. The statutes he will find enumerated in the annexed syllabus:

Lechmere and Carlisle, 3 P. Wms. 218. (*Agreements.*)

Pulteney and Darlington, 1 Br. Ch. Ca. 223. (*ibid.*)

Walker and Denne, 2 F. Vez. 170. (*ibid.*)

Acroyd and Smithson, 1 Br. Ch. Ca. 503. (*ibid.*)

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- Thorp and Thorp, 1 Lutw. 245. (Agreement.)
 Stamford and Hobart, 1 Br. Par. Ca. 288. (Articles.)
 Ffytche and B. London, Cun. Sim. (Simmoys.)
 Shelly's Case, 1 Co. 93. (Heir taking by purchase or by descent.)
 Mohun v. Orby, Eq. Ca. Ab. 343. (Leases)
 Legg and Hackett, 2 Salk. 414. pl. 6. (ibid.)
 Lee and Vernon, 7 Bro. Par. Ca. 432. (ibid.)
 Pybus and Mitford, 1 Ventr. 372. (Remainders, uses.)
 Anon. Winch. 103. 116. (Conditions.)
 Ancaster and Mayler, 1 Br. Ca. 454. (Marshalling assets.)
 Tweddel and Tweddel, 2 Br. Ch. Ca. 101. (ibid.)
 Michell and Reynolds, 1 P. Wms. 181. (Agreements.)
 Good and Elliot, 3 Durn. & E. Rep. 697. (Wagers, Agreements.)
 Fisher and Wigg, 1 P. Wms. 14, 19. (Joint-tenancy and construction of deeds.)
 Staples v. Morris, 7 Br. Par. Ca. 48. (ibid.)
 Bindon v. Suffolk, 1 P. Wms. 96, 1 Br. Ch. Ca. 189. (ibid.)
 Burgh and Francis, 5 Bac. Abr. 41. (Mortgage.)
 Oxwick and Plumer, 5 Bac. Abr. 43. (ibid.)
 Peter and Russel, Ab. Ca. Eq. 321. (ibid.)
 Palmer and Jackson, 5 Br. Par. Ca. 191. (ibid.)
 West and Errissey, 2 P. Wms. 349, 3 Br. Par. Ca. 327. (Articles.)
 Pell and Brown, Cro. Ja. 590, Vaugh. 172. (Executory Devises.)
 Mat. Manning's case, 8 Co. 94. (ibid.)
 Norfolk's case, 3 Ch. Ca. 1. (Executory Devise.)
 Perrin and Blake, Har. L. Tr. 500. and see end of 1 Fearn. Rem. (Executory Devise.)
 Fitzgerald's and Fauconberge, 3 Br. Par. Ca. 543. (Powers.)
 Barnard and Large, 2 P. Wms. 684. (Trusts.)
 Trevor and Trevor, 1 Eq. Ca. Ab. 387, 2 Br. Par. Ca. 122. (Articles.)
 Pillans v. Van Mierop, 3 Bur. 1670. (Considerations.)
 Coggs and Barnard, Ld. Raym. 909. (Consideration, Bailment.)
 Taltarnus' case, year B. 14, 19. (Recoveries.)
 Coventry and Coventry, end of Francis's Maxims. (Execution of Powers.)
 Atherton and Pye, 4 Durn. & E. Rep. 710. (Remainders.)
 Watts and Wain, 5 ibid. 427. (ditto.)
 Zouch and Parsons, 3 Bur. 1784. (Infancy.)
 Slater's case, 3 Brow. Ch. Ca. 500. (ditto.)
 May and Hook, Co. Litt. 8*, 246, b. n. (r) ditto.
 Taylor and Horde, 1 Bur. 92. (Feoffment.)

- Hopkins and Hopkins, Co. Lit. 8^o, 271. n. (1). (Uses.)
Duncomb and Wingfield, Hob. 254. (Remitter.)
Drury and Drury, 1 Ch. Rep. 26. (Partition.)
Jones and Morgan, Br. Ch. Ca. 206. (Trusts.)
Walker and Woolaston, 2 P. Wms. 576. (Administration.)
Loe and Vernon. (Renewal of Leases.)
Bamford and Baron, 2 Durn. & E. Rep. 544. (Frauds.)
Taylor and Horde, 1 Bur. 60. (Disseisin.)
Barker v. Keat, 2 Mod. 249.
Shortridge v. Lamplugh, Ld. Laym. 398.
Zuch v. Parsons, 3 Bur. 1794. (Lease and Release.)
Michell and Reynolds, 1 P. Wms. 181. (Conditions.)
Windham and Chytwynde, 1 Bur. 414, 1 Black. Rep. 95.
Holdfast and Dowson, 1 Blac. Rep. 8. (Statute of Wills.)
Goodright and Harwood, 2 Wils. 497. (Revocation of Wills.)
Jones and Roe, 3 Durn. & E. Rep. 88. (Devise of possibility.)
Robinson and Hardecastle, 2 Durn. & E. Rep. 241. (Appointment amongst Children.)
Doe and Fildes, Cowp. 833. (Construction of a Will.)
Newton and Burnett, 1 Brow. 135. (Sale by Executors.)
Donne and Lewis, 2 Brow. Ch. Ca. 257. (Marshalling Assets.)
Chudleigh's case, 1 Co. 1. (Uses.)
Anon. Booth's opinion at the end of Shepherd's Touchstone,
 (stat. Uses, Executing Fees, and Power of Revocation.)
Weale and Lowes, Polext. 54. (Estoppel.)
Stapilton and Stapilton, 1 Atk. 2. (Uses of Recovery.)
Chesterfield v. Janssen, 2 Vez. 125. 1 Atk. 301. (Usury.)
Loyd v. Williams, 3 Wils. 250. (Usury.)
Murray and Harding, *ibid.* 390. (*ditto.*)
Morrisset and King, 3 Bur. 891. (*ditto.*)
Abrahams and Bunn, 4 *ibid.* 2251. (*ditto.*)
Anon. 3 Atk. 136. (Construction of deeds.)
Pugh and Duke of Leeds, Cowp. 714. Construction of Deeds
 "from the day of the date."
Hotham and E. 1. Comp. 1 Durn. & E. Rep. 645.
Wheeler and Bingham, 2 P. Wms. 419, 626. (Conditions.)
Avelyn and Ward, 1 Vez. 420. (Conditions.)
Enys and Donnithorne, 2 Bur. 1190. (Covenants.)
Whistler v. Newman, 4 Vez. jun. 129. (Separate Property of
 Feme Covert.)
Carruthers v. Carruthers, 4 Br. Ch. Rep. 522. (*ibid.*)
Corbet and Poelnitz, 1 Durn. & E. 5. (*ibid.*)
Marshal and Rutton, 8 Durn. & E. 525. (*ibid.*) (Property of
 Feme Covert.)
Strathmore v. Bowes, 2 Br. Ch. Ca. 343. (*ibid.*)

Pawlet v. Delavel, 2. Vez. 666. (Agreement between Husband and Wife.)

"I shall now proceed to enumerate such books as the student will probably have the most frequent occasion to refer to, whilst pursuing the preceding course of reading."

These books are *The Statutes at Large*, *Fitzherbert's Abridgment*, *Rolle's Abridgment*, *Viner's Abridgment*, *Comyn's Digest*, *Bacon's Abridgment*, *Robinson's Treatise on Gavelkind and Borough English*, *Harrison's Chancery*, *Barton's Exchequer*, *The Reports of Cases*, *Equity Cases abridged*, and *Maddox's Formulæ*, *Lilly's Conveyancing*, *Williams's Precedents*, *Powell's Precedents*, *Bridgman's Conveyances*, *Horseman's Precedents*, *Bird's Settlements*.

In that part which treats of contingent remainders and executory devises, Mr. *Barton* has been particularly concise; he has done little more than transcribe from *Blackstone* a very general and superficial view of a very extensive, a very difficult and abstruse subject. The reason which he assigns for it is the great excellence of the late Mr. *Fearne's* treatise upon the subject, and an unwillingness to injure the copyright of his widow in that book. If this be an excuse for not transcribing the whole or the greater part of Mr. *Fearne's* labours it is unnecessary; it is claiming the merit of compassion, of benevolence, and almost of charity, for not doing that which every consideration of duty, of honour, and of legal responsibility would have prevented him from doing. And, though we admit that the real merits of Mr. *Fearne's* treatise, are such as to preclude the absolute necessity of a new treatise upon these subjects, yet the same may be said of almost every other separate head in this work. Other writers have done much separately for Mr. *Barton* and the profession, but he is the only one who has presented the student with a complete body of general information, and it is his merit that he has left little to be sought for in other works, by those who are possessed of his *Elements*. Why then stop here? why not treat Mr. *Fearne* with the same freedom that he has used towards every one else? On the whole we differ from Mr. *Barton*, and think, that the want of a complete treatise on the head of remainders is a great defect in the work, and we do not

perceive that Mr. *Barton* would have had much labour, in transferring into his work the knowledge which he would have acquired from Mr. *Fearne's* Treatise, even with some improvements. For, while we admire and applaud the abilities which that writer has evinced in the substance of his work, while we perceive great acuteness and depth of research, we regret, that it is conveyed to us in a stile of absolute prolixity and barbarism, somewhat between the tediousness of technical inelegance, and an unsuccessful attempt at ease and fluency. It is indeed our constant regret, that except in the instance of *Blackstone* and a few others, we find that lawyers of great acuteness and ability, are seldom possessed of a stile that makes their writings agreeable to a polished ear. The art of writing elegantly is perhaps only to be acquired by a practice which men of science seldom have leisure or inclination to pursue; but in general, we should be better satisfied with the dry accuracy of the old writers, than the awkward attempts at ease, the untoward affectation of elegance, and the frippery of ornament, which many writers on law and other matters of abstruse science have exhibited in modern times. We doubt much, whether we shall have a better book upon contingent remainders than that of Mr. *Fearne*; we would not throw it away merely because we are often perplexed with colloquial figures and colloquial inaccuracies, and a sort of rhetorical flourish which is only to be picked up at the desk of a conveyancer: but, once for all, we beg, that students who read it will endeavour to avoid the habit of writing in such a stile, and will rather adopt the accuracy, the purity, precision, and ease, which are conspicuous in the notes upon Lord *Coke's First Institute*, which will ever remain a sufficient evidence, that the object which we recommend is not unattainable.

In a second chapter on the Practice of Conveyancing, Mr. *Barton* gives some practical instruction which we think may be useful to every branch of the profession. To some he may appear to have descended into a minuteness which is tedious and uninteresting; but every thing which is truly practical necessarily runs into detail and becomes unattractive. It is, however, not the less useful; and books which give such instruction, teach that which it has hitherto been the complaint of mankind, that books

alone cannot teach, but which, we think, may as well be taught by written as by oral instruction.

"In perusing or settling the drafts of a conveyance, it will be necessary for him to see, 1. That the party taking upon himself the authority to convey is (as far as appears,) entitled to the property intended to be conveyed. 2. That all persons at all interested in, or having any claim or charge upon the premises, (unless they be conveyed subject to such charge,) be made parties to the deed. 3. That the interests of such parties, together with the object of the conveyance, be explicitly set forth. 4. That all parties possessing any legal or equitable estate in the premises, concur in the operative part of the deed, in the manner necessary to pass their respective interests. 5. That such covenants, &c., be inserted in the deed as are necessary to effectuate the general object of the deed, and bind and secure the particular interests and rights of the parties, and afford the most certain and easiest remedy for any want of good faith, or breach of contract in either of the parties.

"In perusing abstracts, or ascertaining the validity of the title to an estate, more circumspection is necessary than in even answering a case; for, in a case the attention is generally confined to one or two objects only, but in an abstract it must be extended to many; he must see, 1st. That the title of the grantor is of sufficient antiquity. 2d. That all parties in any way interested in, or having a claim upon the premises which are the subject of the grant, are made parties to each deed. 3d. That the deed to which they are made parties is of a species calculated to pass the particular species of property of which it is the subject, and that it is amply described. 4th. That each of the parties concur in the operative part of the conveyance, as required by law to pass their respective interests, and no more. 5th. That such concurrence is founded upon a sufficient consideration. 6th. That the deed be properly executed by the granting parties. 7th. That if in York or Middlesex, it be registered. 8th. If it be a bargain and sale, that it be enrolled. 9th. If a will, that it be proved. And 10th. That possession, either actual or legal, follow the conveyance where necessary. Besides attending to these particular objects in each deed, which compose the link by which a man's title is in general deduced, he will further have to see generally, that all charges and incumbrances affecting the premises, by reason of mortgages, jointures, dowers, annuities, rent-charges, legacies, portions, powers, &c. &c. are properly disposed of; and that all terms raised for securing them be either merged and extinguished, or brought within the absolute control of the grantee.

"In answering cases it is necessary that all the circumstances attending the facts should be considered and weighed with the minutest attention, as it frequently happens that, through the inadvertency of the person preparing it, the circumstances of least importance are most prominently stated, whilst those upon which the question chiefly depends are but cursorily noticed; hence the young practitioner, without great circumspection, will be in danger of being misled.

"But although the young conveyancer should feel himself to be perfectly in possession of the merits of the case, yet the law upon it may possibly not be such as upon the first blush of the circumstances it may seem to be, it will be his duty, therefore, well to examine and discuss the reasons and authorities upon which his opinion is founded, before he permit it to bias the judgment, or subjugate the rights of those who, to avoid the expence and uncertainty of litigation, may perhaps have irrevocably bound themselves to abide by his decision.

"After these precautions have been taken, the question may, I trust, be safely committed to the result of his judgment."

A Series of Precedents, or forms of the different species of assurance noticed in the above work, we understand is preparing for the press by the same author, and is in a state of considerable forwardness.

A COMPENDIUM OF THE LAW OF EVIDENCE. *Part II. Containing the Proofs required in those Actions which most ordinarily occur at Nisi Prius.* By Thomas Peake, Esq. of Lincoln's-inn, Barrister at Law. Brooke and Clarke, and W. Reed. 8vo. 1806.

OF the first part of this Compendium of the Law of Evidence, we have already given an account; which we trust raised a sufficient expectation of the utility and propriety of the present volume. We were ourselves so well satisfied of the merits and of the accuracy of Mr. Peake, as a compiler who justly endeavoured to give a concise view of general principles, and the practical distinctions comprised in a legal subject of great importance, that we ventured, without being fully apprised of the extent and nature of his plan, to recommend him to persevere in the completion of it, however comprehensive it might

be; and for this recommendation and advice, now that the whole work is before the public, we find no cause of regret: for Mr. *Peake* has performed his undertaking with great skill and ability, just as we ventured to predict of him.

In the former part of his work Mr. *Peake* treated of the general rules and fundamental principles of evidence, and of the nature of the two great branches under which all human testimony must be distributed, consisting either of proof by written documents or oral testimony, and which in our law are usually denominated *written* and *parol* evidence.

In this part, he proceeds to consider the nature of the particular evidence which must be given in order to establish or defeat a claim to be made by action at *nisi prius*, in the various classes of causes which are ordinarily tried in our courts of justice. These he treats under the following heads: viz. *Of the evidence in general as regulated by the pleadings or other proceedings in a cause. Of the evidence in Actions of Assumpsit. Written Contracts. Parol and implied Contracts.—Of the Defendant's Evidence, and Plaintiff's Evidence on particular pleas.—Of the Evidence in Actions of Covenant.—Of the Evidence in the Action of Debt.—On Specialties.—On simple Contracts.—Of the Evidence in Actions on Statutes. On Penal Statutes.—On Remedial Statutes. Of the Evidence in Actions upon the Case. In Actions founded in Malice and Fraud.—In Actions founded in Negligence.—In Actions for Disturbance.—Of the Evidence in the Action of Trover.—Of the Evidence in the Actions of Trespass and Replevin.—Of the Evidence in the Action of Ejectment.—The Plaintiff's Evidence.—The Defendant's Evidence.—In Ejectment by Landlord against Tenant.—In Ejectment by Creditors who have a lien on the Land.—Of the Evidence in the Action for Mesne Profits.—Of the Evidence by and against Husband and Wife, or by a Husband, Parent, or Master.—In Actions by and against Husband and Wife.—In Actions by the Husband alone.—In Actions by a Parent or Master. Of the Evidence in Cases of Bankruptcy. In Actions by and against the Assignees.—In Actions by and against the Bankrupt.—Of the Evidence in Actions by and against an Executor or Administrator.—In Actions by an Executor, &c.—In Ac-*

tions against an Executor, &c.—Of the Evidence in Actions by and against Heirs and Devisees.—Proof of title by an Heir.—Proof of title by the Devisee.—Evidence by the Heir to defeat the Will.—Of the Evidence in Actions against Officers of Justice.—Against Sheriffs, Bailiffs, and Gaolers.—Against Justices, Constables, and Revenue Officers.—Of the Evidence in Actions by and against Ecclesiastical persons.—In Actions by the Patron or Parson to try the Title to, or obtain possession of the Church.—In the Action for Tithes.—In the Action for Dilapidations.—In the Actions for Non-residence.—Of the Evidence in Copyhold Cases.

In doing this Mr. Peake has chiefly studied brevity and precision. Not having room to dwell long upon the investigation of any principles, he generally states merely the nature of the action, and the proof which is necessary to support it, without stopping to extract cases at length, or to reason upon the grounds of the principal decisions, or the extent of the collateral distinctions. Considering it as an elementary book, this will be thought a defect, and the student will probably feel that his guide is so concise in his instructions that he must read with uncommon attention to avoid the dangers of mistaking the exact limit of the doctrine; for so few words are used, that he who does not infix the whole of every sentence upon his mind, and consider every word of weight, and necessary to the definition, will be apt to run astray from the rule laid down by the author. But as a *Compendium* of *Nisi Prius* practice, and as an assistant to the barrister in court or to the attorney in preparing his briefs, which were, doubtless, among the principal objects of the author's plan, it will be found a work of considerable utility. In this view it is anticipated by none that we are acquainted with, although Mr. *Espinasse* has attempted something of a similar kind, at the end of each chapter in his *Digest of the Law of Nisi Prius*; a work of which it is unnecessary for us to speak, since the extensive circulation which it has had has rendered its merits and its defects alike conspicuous, and it has a great portion of both.

With respect to the utility of this part of the work, and the necessity which there existed for it amongst the profession, these must be obvious to every one who has been a term in an agent's or a special pleader's office. There

we have ourselves seen the interval between the term and the assizes, fully occupied with giving what is called 'advice upon the evidence to be adduced in the case.' In other words, in giving instruction, but too frequently to negligent or unskilful attornies, how to get up the most common cases of debt and assumpsit. From some of this business probably the pleader will now be relieved; or, if the applications for his assistance are still as frequent, he will know where to direct his pupils to extract from Mr. Peake such advice as may be necessary. To the younger barristers who may be consulted upon the circuit, this compendium, as it comprises all the general principles, and most of the necessary distinctions, upon which, with a little cautious ingenuity he may safely enlarge, it will be particularly useful.

We have heard it said, that from its conciseness it must be very unfit for the guidance and instruction of attornies; we think otherwise. It is for that very reason the more likely to be read by them, and we know that too many of them are of so opposite a nature to the *helluones librorum*, that they have little appetite for the devouring of any long work, and can only be tempted to pick a few delicate morsels of very easy digestion. Such of them would be disgusted, fatigued, and bewildered with a full elementary book; and if by the conciseness of this they are misled, it will not be so much by the inadequacy of the writer himself to their instruction, as by their own haste and indiscretion. For such readers no author can be supposed to write; on them his labours would be thrown away; but to the diligent and attentive practiser, who thinks it worth while to study something of his profession, we recommend the use of this compendium.

We shall extract as a specimen, the first chapter, which is more general in its application than any other in the book. It is entitled "*Of evidence in general as regulated by the pleadings and other proceedings in a cause.*"

"To ascertain the evidence necessary to support an action, the first thing to be attended to is the form in which the action is brought, and the statement of the case as contained in the declaration. In most instances the particular circumstances of the case are set forth, but in some few the law permits the use of a certain prescribed form, wholly fictitious, and quite contrary to the facts whereon the action is founded.

"In the first class of actions, the plaintiff is bound to prove the facts stated in his Declaration: any material variance between that statement and the evidence, will be fatal to his cause; and though in fact he may shew a good cause of action, yet not having truly stated it on the Record, he fails on account of the variance.

"To notice in this place the numerous cases which have arisen on variances between the pleadings and the evidence, would tend to confuse rather than to convey any intelligence to the reader. It may be proper to observe in general, that when the Declaration contains impertinent matter, foreign to the cause, and which the Master on a reference to him would strike out, such impertinent matter will be rejected by the Court, and need not be proved.* But where facts themselves unnecessary and immaterial, but at the same time not wholly impertinent, are set out in the Declaration, these must be proved, though no evidence would have been required of them, had they not been alledged.

"In general, dates and sums are immaterial, and being stated under a *videlicet*, the party is not bound to strict proof; but where any written instrument or record is stated, or the exact time or money is material to the merits of the cause, it then becomes necessary to prove the fact exactly as laid. Thus where in an action for a malicious prosecution, the Declaration stated that the indictment came on to be tried on the 25th February, and by the Record it appeared that it was tried on another day, the variance was held to be fatal.† So where the return of a writ is mistated, the production of the writ so mistated will not support the pleadings. In an action for usury, the loan was stated to have been made on the 21st of December, when in fact it took place on the 23d; and the plaintiff was nonsuited on account of this variance.‡ So in a plea of set-off to a bond, where the defendant is required by the statute to set out in his plea the exact sum due to the plaintiff; if he state a less sum to be due than actually is, the sum so stated may be traversed, and the defendant will fail on his plea.§

"In the above cases the days and sums were so material, that no form of pleading could have helped the party; but where the day or sum is not material to the merits of the cause, the plaintiff may, by stating it under a *videlicet* (as observed above) escape the danger of a variance, which might otherwise be fatal. Thus, where a Declaration on a warrant of sheep stated, that

* Dougl. 667, 2 Blac. 1101. † Pope v. Foster, 4 Term Rep. 590.
Green v. Rennet, 1 Term Rep. 46". ‡ Carisle v. Treco Cowp. 671.
§ Grimwood v. Barry, 6 T. Rep. 460.

in consideration the plaintiff would buy of the defendant 45 sheep for 54l. 11s. 6d. the defendant promised they were sound; and it appeared in evidence, that the price was 54l. 12s. 6d.; this not being laid under a *videlicet*, the plaintiff was nonsuited; but had the Declaration stated the purchase to have been for a large sum of money, *to wit*, 54l. 11s. 6d. the variance would have been immaterial.

"*Contracts* should in all cases be truly set out;* if the contract be different from the Declaration in any part, the whole foundation of the action fails; because the contract is entire. So where a *right* or *custom* is pleaded, it should be stated with all exceptions and modifications to which it is liable;† otherwise the pleading will not be supported by the evidence. If a custom be stated as that of a particular place, evidence will not be received of the like custom prevailing in a place adjoining. Thus the custom of tithing in the parish of *A.*‡ will not be evidence of the custom of tithing in the parish of *B.* if the custom of that parish only be pleaded. But had it been laid as the custom of a larger district, including both *A.* and *B.* it would have been evidence in support of the issue. In like manner the custom of one manor will not be evidence of the custom of another adjoining, unless in cases of some general law or quality, of which description is the general rule of most manors in the northern counties bordering on Scotland, and therefore called Border Law, that the tenant shall be admitted, and pay a fine on the death of every new lord.§

"In cases where the law gives a general form of Declaration, as in trover, ejectment, &c. the plaintiff has only to prove his title to recover, and by a fiction of the law, that title is considered as proving the case stated on the Record, and the Jury are directed to find the facts so stated.

"Actions may be again considered as they are *local* or *transitory*. Local actions must, as the term implies, be laid in the county where the cause of action arises. The county is in this case a material circumstance in the cause, and unless the plaintiff prove it as laid in the Declaration, this variance is fatal to his action. But in those actions which are *transitory*, the plaintiff has the privilege of electing any county he pleases, and the place laid in the Declaration is merely *formal*, and need not agree with the proof. Thus where, in an action for running down the plaintiff's boat, the declaration stated the injury to have been done *near Half-Way Reach*, in the River Thames;|| and it was

* Term Rep. 240. † Griffin v. Blandford, Cowp. 62. ‡ Furniaux v. Hutchins, Cowp. 817. § Dean and Chapter of Ely v. Warren, 2 Atk. 189. Duke of Somerset v. France, 1 Str. 654. || Drury v. Twiss, 4 Term Rep. 558.

proved to have happened in Half-Way Reach; the proof was held to support the Declaration. So where an action of assumpsit was brought, on an agreement to procure the plaintiff a booth at a horse-race, and the Declaration stated that there was a race upon Barnet Common, in the County of Middlesex;* and it appeared in evidence that the whole of Barnet Common was in Hertfordshire; this was also held to be no variance.

"In these transitory actions, however, the defendant may change the venue by motion to the Court, founded on an affidavit that the cause of action arose wholly in another county; and the plaintiff cannot bring it back to the county where it was originally laid, without undertaking to give material evidence in that county. This undertaking makes the action in some degree local, and unless the plaintiff comply with the condition, he will be nonsuited on the trial.† The defendant therefore should, in all cases where the plaintiff has so undertaken, be prepared to produce the Rule at the trial, in order to bind the plaintiff to his engagement.

"It was formerly held, that on an undertaking of this nature, the plaintiff could not give any evidence which arose in another county, but that all his evidence must arise in the county wherein the venue was laid;‡ but it is now deemed sufficient if he give any one material piece of evidence arising in that county;§ and even in actions in their nature local, if the different facts which constitute the right of action arise in different counties, the plaintiff has his election in which to lay his cause.

"A Deed inrolled in Middlesex, or the production of a Rule for payment of money into Court in the action, though obtained after the Rule to change the venue was discharged, is a sufficient compliance with the undertaking to give material evidence in that county.||

"So it has been said that proof of the cause of action arising in a foreign county, is sufficient,¶ but the bare circumstance of the witnesses residing in the county where the venue is laid, will not alone satisfy the undertaking.**

"Another method by which the defendant may confine the generality of the plaintiff's statement, and consequently narrow his proof, is by obtaining a Judge's Order for the particulars of the plaintiff's demand. This is granted almost as of course in most actions founded on contract, and when a bill of particulars is delivered under the Order, the plaintiff will not be permitted to give evidence at the trial of any demand not contained therein.†† Thus if, in a bill of particulars so delivered, the plaintiff

* *Frith v. Grey*, *ibid*, 361. † *Santler v. Heard*, 2 *Blac.* 1031. ‡ 1 *Sid.* 442, *Salk.* 669. § 2 *Term Rep.* 241. || *Watkins v. Towers*, 2 *Term Rep.* 275. ¶ *Gerrard v. Roebeck*, 1 *H. Black.* 280. ** *Santler v. Heard*, 2 *Black.* 1031. †† *Wade v. Beasley*, 4 *Exp. Ca.* 7.

state his cause of action to be on a Promissory Note only, and it appear that the note is void for want of a stamp, the plaintiff cannot go into evidence of the consideration whereon it is founded, though the Declaration contain counts on such consideration. Again, where the Declaration contained counts for goods sold and delivered, and for money had and received, and the plaintiff delivered a particular merely for horses sold to the defendant; the Court held that he was precluded from going on his count for money had and received, and proving that the defendant had sold horses on his behalf to third persons, and received the money for them.*

"As the rules of pleading allow, in some cases, a general form of Declaration to the plaintiff, so in many actions the defendant is allowed a general form of plea, which disputes every thing in the declaration, except those legal fictions which are considered as indisputable; and puts the plaintiff upon proving the whole of the case he has stated in the Record.

"In other forms of action, on the contrary, the defendant is, by the rules of the Common Law, obliged to select a particular part of the Declaration in his plea, and the plaintiff is not compelled to prove more than the fact which is denied by it. Since the Statute for the amendment of the Law, however, this distinction is in a great measure done away;† for, though the defendant cannot by one compendious plea deny the whole of the Declaration, he may, by leave of the Court, plead several distinct pleas to each part of it; and so put the plaintiff on proving the whole.

"But though the defendant may, by the *General Issue* alone, in actions where such plea is allowed, put the whole of the case stated in the Declaration in issue, yet there are some acts by which he is considered as partially admitting the Declaration, notwithstanding that plea. In all cases of Contract, where the damages are certain and liquidated, the defendant may at the time he pleads, obtain a Rule for leave to pay so much money into Court as he admits to be due; and this payment so far controuls the General Issue, as to prevent the defendant from disputing that he did contract in the manner stated in the counts on which money is so paid, and reduces the question between the parties to the quantum of damages which the plaintiff is entitled to recover. Thus if, in an action on a Bill of Exchange, the defendant pay money into Court on the whole Declaration, the Bill, being admitted by this act of the defendant, need not be proved by the plaintiff on the trial.‡ So where a defendant paid

* *Holland v. Hopkins*, 2 Bos. and Pul. 243. † 4 Ann. c. 16. ‡ *Cutteridge v. Smith*, 2 H. Black. 374.

5l. into Court on a declaration against him as a carrier, stating a general contract to carry the plaintiff's goods, it was held that the plaintiff was not bound to give further evidence than the production of the rule, and proof that the goods were of greater value than the money paid into Court;* and that it was not competent to the defendant to prove a general notice, that he 'would not be responsible for more than 5l. for any species of property contained in any article lost or damaged, unless the same were booked and paid for according to the value;' for that, by paying money into Court, the defendant had admitted the contract, as stated in the Declaration, and that he had undertaken to the full amount of the goods. But in a subsequent case, where the notice was, 'that no more than 5l. would be accounted for, for any goods or parcels, unless entered as such, and paid for accordingly,'† the Court held that the plaintiff might state the contract of the defendant in general terms, and that by paying money into Court on such a general Declaration, the defendant would not admit more than his contract for the safe carriage of the goods, nor preclude himself from shewing that he was, by reason of the notice, not liable to damages beyond that sum; for that the notice did not alter the contract for the safe carriage of the goods, but only limited the amount of the damages, in case the contract should be broken. In this latter case the Court said that the case of *Yate v. Willan* could not be supported in its full extent; for although the payment of money in that case did admit the contract as stated in the Declaration, it did not admit a contract incompatible with the restrictive provision, as to the amount of damages to be recovered in case of loss.

"If an action be brought for a demand compounded of different items, some of which are founded on good and others on illegal considerations, and the defendant pay money into Court on the whole Declaration, the plaintiff will not be permitted to apply the money so paid in satisfaction of the illegal demand, and to recover the other;‡ for, the payment of money into Court is an admission of a legal demand only, and not of one founded on a corrupt consideration.

"Similar in effect is the plea of Tender, by which the defendant admits that the plaintiff has some cause of action, and therefore he cannot afterwards call on the plaintiff to give further evidence than is necessary to shew the amount of the debt.§ Thus,

* *Yate v. Willan*, 2 East Rep 123. † *Clarke v. Marsden*, 6 East, 564.
 ‡ *Smith's Rep.* § *Ribbans v. Cricket*, 1 Bos. and Pul. 264. § *Middletown v. Breuer*, Peake's Ca. 15.

if in an action founded on a promise to pay the debt of a third person, (which, by the Statute of Frauds, must be in writing), the defendant plead a Tender, the plaintiff will not be called on to prove the promise, but only the amount of the debt due from the person on whose behalf the promise was made.

"Besides the pleas which go to the merits of the action, there are others which only *abate* it, on account of some disability in one of the parties, or informality in the proceeding; and as these do not deny the right of action, they must give the plaintiff a better writ.

"It would be quite foreign to the purpose of the present work to go through the several matters which may be pleaded in abatement; it is sufficient to observe, that the issue in most of them when traversed, lies on the defendant, who must prove the facts stated in his plea. Nevertheless, in actions of Assumpsit and other actions where damages are to be recovered, the plaintiff must prove his cause of action to ascertain the amount of the damages.

"A distinction which has been taken between actions of Contract and actions of Tort, may also be properly noticed in this place. In the former, if one of several partners or joint-tenants bring an action alone, the defendant may give the right of the others in evidence on the *general issue*, and the plaintiff will on such evidence be nonsuited.* But if an action of Tort be brought by one partner alone, this must be pleaded in abatement, or else the defendant will be precluded from proving the fact for any other purpose than that of taking off a moiety of the damages. If the defendant be liable jointly with other persons who are not joined, this must be pleaded as well in actions of contract as in those for the non-performance of a duty, such as Case against Carriers, &c.† and cannot be taken advantage of on the general issue; but in actions founded on a tortious act or trespass committed by several, there can be no such plea, for each Tortfeasor is separately liable."

This extract is, we believe, sufficient to give our readers a just opinion of the manner in which the work is written, and to establish fully the truth of our observations with respect to its accuracy and conciseness; but we must add, that in making our extract, we have been obliged to omit the marginal notes of the subject of each principal paragraph, by which the author has added greatly to the facility of using it as a book of reference.

* *Leglise v. Champante*, 9 Stra. 820. † *Rice v. Shute*, 5 Burr. 2611.
Buddel v. Wilson, 6 Term Rep. 369.

A TREATISE ON CONVEYANCING, with a View to its Application to Practice: being a Series of Practical Observations, written in a plain familiar Style, which have for their Object to assist in preparing Draughts, and in judging of the Operation of Deeds, by distinguishing between the formal and essential Parts of those Deeds, &c. in general Use. Being a Course of Lectures. With an Appendix of select and appropriate Precedents. By RICHARD PRESTON, of the Inner Temple, Esq. Author of the elementary Treatise on the Quantity of Estates, &c. &c. Clarke and Sons, Portugal-street. 1806.

THE author of the work now before us is too well known to need our recommendation to give currency to his opinions, or to add to his reputation. But whatever character he may have acquired for skill and learning in that branch of legal science which he has studied, as he himself states in his preface, more than twenty years, we believe, that, far from being diminished by the present publication, it will be greatly augmented; at least in so much as it evinces that the author is not only a practical conveyancer, but one who unites to practical skill and experience great acuteness of investigation, and much adroitness in the arrangement and elucidation of the principles upon which, considered as a practical science, the knowledge of conveyancing is founded. For our parts, we were sufficiently convinced of this from perusing Mr. Preston's first work, his *Treatise on the Quantity of Estates*, which, though professedly the work of a young man, is, in our opinion, the best elementary treatise upon the subject which has yet been written, and which, therefore, as it has been long out of print, we should be happy to see republished, with such corrections as may now appear requisite. The principal merit of that work consists in a clear and original mode of thinking, and a natural and scientific arrangement, by which not only the intellectual vigour of the writer is very forcibly displayed, but the student is considerably assisted in his progress in the learning of the law relative to conveyancing and the same we believe to be the characteristic of the work before us. Mr. Preston is one whom we may allow to speak for himself, and we were particularly struck with many of the following observations in the preface on the nature and utility of technical forms, the justness and propriety of which must be obvious to every one. If there should be found in them somewhat of con-

scious pride and satisfaction, we ourselves prefer it much, where it is supported by such strong claims, to the rivelling cant and creeping humility of many of the prefaces which implore the favour of the profession, with meanness and servility, for that which, if ill-executed is indeed discreditable to the writer, but which is generally of most easy performance and most obvious utility. Speaking of his labours, the author says :

‘ The peculiar advantage of this work, if it has any, is that it is the fruit of much reflection and extensive experience. It may be considered as the sentiments of a practical man, on a practical subject. As far as the theory is given,—the attention is kept closely to those points which are of ordinary occurrence, and comprise the more useful parts of a lawyer’s knowledge. Recondite points are highly valuable to form the profound and well read lawyer; but to the student, and mere practical conveyancer, that knowledge is most useful, which is most necessary to be gained for the purposes of general business. When the practice and the rules by which it is governed, are understood, the study of more abstruse points will be rendered easy. In teaching the law, as well as any other science, it should be a rule to proceed by insensible steps; to begin with that part which is easy and introductory, and proceed to those parts of the science which are more difficult.

‘ The misfortune of a person, who, either as clerk to a solicitor, or as a student in a conveyancer’s chambers, begins to study the practice of conveyancing, is, that he is taught by form, or precedent, rather than by principle. He is made to copy precedents, without knowing either their application, or those rules on which they are grounded. When he begins to prepare draughts, he is led to expect all his information from these forms; and his knowledge is, in the end, as limited as the means by which he has been instructed.

‘ One of the principal difficulties to be surmounted, by a person so educated, is to gain sufficient strength of mind and resolution, to free himself from the shackles of precedent. The apprehension of erring makes him fear to try his own resources. This fear proceeds from a want of sufficient knowledge, to discriminate between form and substance; in other words, between the formal and the essential parts of a deed, &c. The next difficulty proceeds from the want of ideas; in short, of useful knowledge. Without understanding, from principle, the object to be attained, how is any one to accomplish that object? The very foundation is wanting. There are no ideas formed; and, for that reason, none can be brought into action. To acquire these ideas, extensive reading, and, to a certain extent, the practical knowledge of

business; in other words, an intimate acquaintance with the provisions, which are absolutely *necessary*, and also of those which are usual in transactions of this sort, are to be acquired: and a collection of good precedents is one of the sources from which knowledge of the usual provisions may be attained. When the object to be attained is fully comprehended, the next consideration is the means by which it is to be accomplished. This leads to the form of the assurance.

‘Two conclusions may be justly formed; 1st, That no one will ever become a good conveyancer, unless he understands so much of the law, as will make him acquainted with the rules by which property and the mode of conveying it are governed; 2dly, That unless he makes himself so far acquainted with practice, as to understand those forms which are in use by practical men, he can never attain to any eminence. Few who can form correct ideas, feel any difficulty in giving them expression by language; but this will be done, with more or less precision, and more or less succinctly, according to the peculiar talents and habits of the party. In the practice of the conveyancer there is a species of language founded on decided cases, or sanctioned by experience, which is perfectly understood by all professional men of information: by them it is read with ease, and comprehended without a second thought; because the words have a technical and appropriate sense, on which good lawyers are, by the rules of law, bound to agree. This is the advantage of a close adherence to this species of language. A polite scholar would, perhaps, be disgusted with the phraseology, and with the tameness of the periods. He would be led to make an effort to give the like ideas, in all the elegance of polite diction, and finished sentences; but would any lawyer be able to advise with certainty, on the construction this language would receive? A departure from technical language would, sometimes, allow of a twofold construction, in short, raise a doubt, whether the words are to be read in one sense, or in another. Something of this is to be discovered in the wills, or the contracts, of some of the best scholars, and even of men who, as merchants, are in the habits of business; and in acts of parliament when altered by any other than professional men. It is also to be found in the wills of eminent lawyers who, from their peculiar habits of business, have never turned their attention to express legal forms, in technical language. The great art of the conveyancer, is to use no other language, in the operative part of deeds, than such as has a fixed and definite meaning. For the sake of this reputation, and from a sense of duty, it should be his first care, to use such phrases only as he is satisfied will receive the meaning he ascribes to them, and attain the very object at which he aims. If the words he uses, can be read with two different applications, he has injured, instead of serving his client: he has involved him in the chance, at least, of a suit at law or in equity, instead of placing him in a state of repose and security; and perhaps

has injured, nay even ruined, a man whom it was his intention to have served and protected.

‘These observations are introduced for the purpose of shewing the importance of an adherence to language sanctioned by the experience of professional men of eminence. Nor does this language exclude simplicity or neatness. A well prepared instrument may be read, and admired, by a man of sense. At least, the better it is understood, the more it will please; and an excellent scholar would in the end, be convinced that he could never do better, for his ease and comfort, or the security of his employer, than condescend to become a careful observer of the language of these forms. His study should be to simplify the terms, as much as circumstances, and the intention will admit. This will be most effectually accomplished, by rejecting tautologous and synonymous expressions, and confining himself to that part of technical language, which is essential to express, or give legal effect to the intention of the parties. The student should also prescribe it to himself as a rule, to adhere to general forms, and to the same language as much as the intention will admit, and to vary the essential parts as often as circumstances require it; and to be careful to express the essential parts of the deed in language the most precise and definite that he can find, or that experience, precedent, or his own improved judgment shall dictate. As often as he varies from form, or from the experience of others, he should be well assured, that he is sanctioned by superior authority; and that the variation will have exactly the effect he wishes to be ascribed to it.

‘These observations are not meant to tie down the student to be a mere copyist; to deny him the best privilege of a liberal mind;—to think and act for himself. They are intended only as cautions to youth, and as a guard against too great anxiety to give proofs of aspiring genius, by a total neglect of form, or disregarding the practice of experienced men. The further he advances, the more he will be satisfied of the value of the experience derived from others; and, as far as the author’s observations have enabled him to judge, those gentlemen alone have succeeded who have pursued this course of study.

‘To distinguish between the formal and essential parts of deeds, is one of the great objects of the work now submitted to the profession. To guard the student against error, and to form his mind, as they are objects of the first importance, so they are always kept in view throughout this work.

‘That this object might be continually enforced, the author has frequently sacrificed himself to his reader. He has rather subjected himself to the imputation of repetition of the same thoughts, in different parts of the work, than neglect those cautions, or that chain of thought, or line of arrangement, which the immediate

context seemed to require. This will be found in a more than ordinary degree in the chapter on Recoveries and Fines: and it is in those chapters to be accounted for, from the circumstances that the part in recoveries which relates to recovery deeds, and the part in fines, which relates to the form, &c. of fines, and the deed to lead or deciare the uses, are additions to the original manuscript.

‘ Each chapter contains a succinct essay on the particular assurance of which it treats. In reference to that assurance there is a part which is *theoretical*, and a part which is *practical*.

‘ The theoretical part is intended to inculcate first principles; to teach the student *elementary* rules; the nature, the object, and the use of the particular assurance; the purposes to which it may be applied, and the circumstances under which it may be used, and the cautions to be observed. The practical observations detail the parts of the deeds, &c. with comments on the form of the assurance. They also distinguish such parts as are formal, from those which are essential; and in the *Appendix* forms are added, in illustration of the practical observations.

‘ This arrangement of the subject accounts in some degree for the arrangement of the book.

‘ Some may express their surprize that the work commences with *Common Recoveries*. This happened by accident, but this very accident, has perhaps been productive of advantage, as it determined the form of the different chapters.

‘ *Sheppard*, in his *Touchstone*, commenced with fines and common recoveries. This circumstance, however, had no influence in the author's arrangement. For its origin, it is indebted to the circumstances under which the observations were dictated.

‘ The original design was to write on detached clauses of deeds, as collected for the use of pupils, in several volumes, denominated *Common Forms*. The clause of agreement for suffering a common recovery, and the declaration of the uses, is the first form, in the first of these volumes; and this single circumstance was the origin of the arrangement of the work.

‘ After some progress had been made with the observations, the author felt, that if he had sat down to write a systematical treatise on conveyancing, he ought to have given a different form to the work, and treated of it, in a more scientific manner, and by way of elementary deduction. Reflection reconciled him to the course he had adopted. Each chapter, as it stands, is a commentary on the particular assurance of which it treats; and the author considers that it may be used by others, as he intended it should be used by his own pupils. The moment it is determined to adopt a particular assurance, for example, a lease and release, the chapter which treats of that assurance may be

read by the student, with a view to understand the general rules respecting these deeds, and the parts of which they consist. When he is preparing his draft, he may consult each division of that part of this chapter, which treats of the form of this assurance, and thus, at once, with the assistance of his precedent, and with no great exertion of mind, combine the theory and the practice, by which his attention is to be governed. By pursuing the same course, as often as he shall find it necessary, he will ultimately, and at no distant period, render any further recourse to this chapter unnecessary.

‘Beyond the form of a deed, are its final object; for instance, the lease and release may be parts of an assurance for suffering a common recovery; for completing a purchase; for effecting a settlement, &c. The particular learning most interesting, as to common recoveries, will be found under that chapter; and may be consulted as the occasion shall require: and should the author be blessed with life and health, and his labours be favourably received by the profession, he will add chapters which shall contain the appropriate observations on purchases, settlements, &c. Considerable preparation is made towards the accomplishment of this object.

‘Another reason too which determined the author not to begin from the more elementary parts of conveyancing, was, that he found this part of the subject, performed in a very valuable little manual, under the title of *Sheppard's President of Presidents*. This work is now out of print. By way of lecture, the writer of these observations, some time since added considerable additions to it, and the present impression of his mind is rather to publish a new edition of this little work, with the addition of his notes, than to withhold from the profession a book more valuable and more useful, than any he could substitute, and he will take an early opportunity of publishing this little work, and, by that means, supply the deficiency which may appear in the present publication.

‘The present publication is intended to consist of two volumes.

‘The volume now offered to the profession embraces the following subjects:

‘Common Recovery,—Recovery Deed,—Fines.

‘And an Appendix of Forms of Recovery Deeds.

‘The next volume, which, with the exception of the first chapter, is ready for the press, will include the heads,

‘Deeds to lead and Deeds to declare the Uses of Fines,

‘Leases,—Lease and Release,—Appointments,—Bargain and Sale, Assignments of Choses en Action,—Assignments of Terms, Assignment of attendant Terms.

‘Surrenders, and Merger as connected with that learning.

‘When the author shall have leisure to finish another volume,

it will comprise practical observations on 'Purchase Deeds,—Settlements,—Wills, &c.

'The author has endeavoured as well to form the judgment of the student to the point of title, and enable him to give an opinion on a deed already prepared, as to prepare one with skill.

'To complete a regular course of study, on practical subjects, the author has begun and made considerable progress with a treatise on Abstracts of Title. This treatise will be of considerable length, and to finish it, in a manner the subject deserves, will require great labor and research. It is intended in this work, to shew the points to be regarded in

'1. Preparing an abstract,—2. Examining it,—3. Arranging it,—4. Advising on it; And thus to detail the duty of the solicitor and of the counsel, in every branch of the profession. Throughout this work the author has availed himself of the result of all the practical information he has been able to collect in the course of twenty years' experience; and has endeavoured to teach the mind those modes and habits of arrangement, reflection, &c. by which the conveyancer is enabled to accomplish those objects, which are beyond the reach of a mind, unacquainted with the powers of combination, arrangement, classification, &c.

'In the law, as in every other study, the principal end to be attained, is to gain simple ideas; and for this purpose to separate, and as occasion requires, again combine parts of a complex idea; to distinguish carefully and correctly; and to give to distinct objects the distinct ideas to which they are separately entitled. This indeed is the principal secret of all science, and distinguishes the great lawyer from those who have read much and profited little; who have blended together ideas totally distinct; have learned cases without understanding their principle; in short, have confused, instead of informing, themselves.

'To teach the mode of doing this, as far as it can be taught, and as far as the author's feeble powers will enable him, was an object thought deserving of the attempt; and the attempt was made in a series of lectures: and though the author feels how short he has fallen of perfection, his endeavours may call forth the exertions of some one, more equal to the performance. While, in every other science, there has been a laudable exertion employed in simplifying the elements of science, and facilitating the attainment of knowledge, his object has been to assist in this plan, as far as it embraces the subject, which has employed his attention and occupied nearly all his time and all his thoughts, for full twenty years.

'With the last work he wishes to conclude his labors; and if he shall find he has assisted others, in their studies, he will feel himself abundantly gratified; in having fulfilled those duties he owes to the profession, as a return, and grateful tribute, for the

liberal patronage with which his humble endeavours have been rewarded. Circumstances would have perfectly justified him in consulting his ease, rather than appearing before the public again, and exposing himself to censure or critical observation. Writing from the motive of doing good, and not of interest, or vanity; sacrificing his own best comfort, and convenience to a sense of duty; he will lament to find that he has failed of his object. He has no expectation that his labors are exempt from errors. From his own observation, he is well assured few books on the law, can be expected to be free from observation, and still less from difference of opinion, on practical points. As far as it has been in his power, he has endeavoured to have his errors corrected. This has been done rather from an anxiety not to mislead than from fear of the lash of censure. From the liberality he has uniformly experienced, he is well assured, that, from those to whom he is known, he has nothing severe to apprehend. They will pardon the error in weighing the motive, and will be satisfied that in treading on new ground, many errors were to be expected. All he can say, is, that he will be the first to correct any errors, the moment they shall be detected by himself, or communicated by others. His own justification will be in the fullest conviction, he has not omitted any opportunity of giving the best information in his power to those whom he wishes to assist.

‘As this work was for the most part written without any previous collection of authorities, and without any concerted plan, it must be in many instances received as the opinion of the author, on points of practice; and not as a collection of texts from decisions of approved authority. Though a reference is frequently made to decided cases, these have been added merely to afford the reader the opportunity of consulting some cases relating to the point. The great difficulty, in many instances, has been to find authorities which could exactly support the author’s position. This has happened from the circumstance, that the author has taken practical conclusions rather than the determination of the point of any particular case: and, in many instances, the observations are a mere transcript of opinions given in the course of practice. From these observations, the reader will judge with caution, and give the different propositions that degree of credit only they shall be found to deserve on a more extensive research into the law, and on a perusal of books of approved authority.’

To extract this preface is, we think, to give the best review of the book. It develops sufficiently the plan which the author has had in view, and Mr. *Preston* has too much acuteness not to see what is necessary, what is useful and excellent, and too much conscious ability not to

make considerable progress in the attainment of what he proposes. The plan which he has designed for his future labours we cannot but approve of, and we sincerely wish that he may be enabled speedily to execute it. With respect to the plan of re-editing *Sheppard's President of Presidents*, notwithstanding all our respect for antiquity, we should advise Mr. *Preston* to consider well whether it will not be better to adopt a plan and arrangement of his own. We are anxious to see men like Mr. *Preston* seriously engaged in the improvement of the law; and we are convinced that the learning of it will be most facilitated by the application of a vigorous mind working upon a natural and original plan, with the aid of all the lights that our ancestors have afforded us, than by following precisely in their steps. In some instances we know there may be a just exception, where the celebrity of an ancient author has given him the rank of a classic, and has caused him to be universally studied for obtaining elementary knowledge or for general reference. In that case it becomes irksome to divert us from a long beaten path, and rather than incur the difficulty of exploring a new road, we are happy to compound for the improvement of the old one; but this we believe does not happen in the instance alluded to. We must still leave it to Mr. *Preston's* better choice, but we hope that he will at least give it further consideration before his determination is fixed, and we shall be satisfied with the result.

We cannot more completely satisfy our reader of the nature of this work, than by giving the following account of its contents, with an extract to shew the manner in which it is written, of which it is sufficient to say that the style is clear, unembarrassed, simple, and concise.

Of recoveries and their operation—Observations on the operation of fines as distinguished from recoveries—General observations continued—Of recoveries of equitable estates—On the parties to a recovery—By what means the tenant to the writ of entry is made—Who shall be a sufficient tenant to a writ of entry, in point of estate—Who shall be said to have the freehold—Who in point of estate, &c. can make a sufficient tenant to the writ of entry; and to what extent in point of share—At what time tenant must have the freehold—Instances in which a recovery will be good, although the actual freehold of the particular lands is not in the person named as tenant in the writ of entry

—Regulations by statute concerning the evidence of the recovery from the deed making the tenant—Of cases in which the law does, and does not, admit of the presumption that there was a good tenant to the writ of entry—Of recoveries good by estoppel, without a good tenant to the writ of entry, and of the necessity of the concurrence of a tenant in a former recovery, in a second recovery, or the deeds preparatory thereto; with observations by way of caution, to guard against the inconvenience sometimes experienced from the present practice—Of the concurrence of persons who have particular estates, to enable a remainder-man or reversioner in tail, to suffer a recovery; and the cautions under which such concurrence may be safely given—Cautions when it is doubtful whether a person who intends to suffer a recovery has an estate for life or in tail, or when there are, or are supposed to be, contingent remainders to be preserved—On voucher—Of recoveries with single voucher—Of recoveries with double voucher—Of recoveries with treble voucher—By what tenants in tail a recovery may be suffered with effect, and to what extent in point of share—Of the necessity of a seisin in the demandant before any uses can arise under the recovery—Of points relating to the execution—Observations peculiarly applicable to lands of copyhold tenure—Of the recovery deed—1. Of the date—2. Of the parties—3. Of the recitals—4. Of the testatum clause—5. Of the operative words—6. Of the parcels—7. Of the *Habendum*—8. Of the agreement to suffer the recovery—9. Of the declaration of uses.—Of a fine—The parties to a fine—Of the several sorts of fines, 1. A fine *sur conuizance de droit come ceo*, &c.—2. A fine *sur grant et render*—3. A fine *sur conuizance de droit tantum*—4. A fine *sur concessit*.—Fines of two sorts at common law and with proclamations—The general objects to which fines are directed, namely, 1. As a conveyance by married women—2. As a conveyance by issue in tail—3. To gain a title, or confirm one, by non-claim—Of bar by non-claim on a fine—Exception as to the king, and certain ecclesiastical corporations—Exception as to infants, persons of unsound mind, *femes covert*, and imprisoned persons—By whom a fine may be levied—To whom a fine may be levied—In what courts a fine may be levied—On what writs—Of what parcels—By what names—The parts of a fine—At what time a fine is complete as a conveyance—When complete as operating under the statute of proclamations.—The difference between a fine, 1. As a conveyance—2. As an estoppel—3. As a bar to issue in tail—4. As a bar by non-claim—On what fines uses may be declared—By whom the uses of a fine may be declared—Of resulting uses—Of deeds to lead and to declare the uses of a fine.

' Of Recoveries and their Operation.

' No instrument prepared by the conveyancer requires more attention than this assurance

' It is to be considered principally as the assurance by which tenant in tail (a) may convert or enlarge his estate-tail into a fee-simple; or, more accurately speaking, (as will be afterwards shewn) into a fee commensurate with the estate, which, at the time of creating the intail, was vested in the person by whom the intail was created, and thus bar the estate-tail, and all remainders and reversions expectant on that estate, and all conditions and collateral limitations annexed thereto (b); and charges subsequent to the same. When the donor of the estate-tail has a fee-simple at the time of creating the estate-tail, the recovery of tenant in tail, duly suffered, will enlarge his estate-tail into a fee-simple. In those instances, however, in which the donor of the estate-tail had merely a determinable or defeasible fee, the effect of a recovery by a tenant in tail, will, upon principle, be merely to give an interest commensurate with that ownership: for as a recovery by a tenant in fee (c) will not bar an executory devise or springing use annexed to that estate, it is absurd that the recovery of a tenant in tail, created out of this determinable fee, should have the effect to give an interest which could not have been acquired by the donor of the estate-tail. The same reason applies to an estate-tail derived out of a qualified or defeasible estate in fee. In short, the recovery cannot produce any other effect than to acquire that extent of ownership which belonged to the donor of the estate-tail. Let it be remembered, however, that though the owner of an estate in fee, subject to an executory devise or springing use, cannot bar such future interest, a recovery by tenant in tail will bar an executory devise or springing use annexed to its estate. Such executory devise or springing use falls within the terms condition subsequent, or collateral limitation (d).

' In a thing created *de novo*, as a rent, in which there is merely an estate-tail, without any remainder over, a recovery suffered of the rent by tenant in tail, though it may bar the estate-tail, cannot give to the rent a continuance beyond the period limited by the original grant (e). This point illustrates and seems in some degree to prove the proposition now under consideration.

(a) Pig. on Recoveries, 121. Siderf. 202. (b) *Benson v. Hodson*, 1 Mod. 108. 2. Lev. 29. Page v. Hayward, 2. Salk. 570. Pigot on Recoveries, 176. *Driver v. Edgar*, Cowp. 379. *Gulliver v. Ashby*. Burr. 1929. (c) *Pells v. Brown*. Cro. Ja. 590. Palm. 131. 2 Fearn, Pigot, 104. (d) Page and Hayward, 2 Salk. 570, already cited, *supra*, p. 2.. (e) *Chaplin v. Chaplin*, 3 P. Williams, 229. *Butler's Co. Lit.* 298, n. 2.

‘When, however, the estate-tail in a rent is derived out of a fee-simple already existing in the rent, or the estate-tail is limited on its first creation with remainders over, the recovery of tenant in tail, duly suffered, will acquire the whole dominion or ownership in the rent to the extent of the estate-tail and remainders (*f.*) The objection, that there cannot be a remainder of a thing created *de novo*, no longer prevails (*g.*)

‘To bar an estate-tail; and remainders and reversions, &c. expectant on that estate, is the general use of a recovery; and in its operation, as barring the estates of persons in remainder, it is peculiarly the assurance of tenant in tail, and has this effect only when it is suffered by the donee for the time being of that estate.

‘The assignee of tenant in tail is not qualified to suffer a recovery with effect (*h.*) Nor is a person who has an estate to him and his heirs, so long as another shall have heirs of his body (*i.*), for he has a determinable fee, and not an estate-tail.

‘Nor can the *issue* in tail with effect suffer a common recovery in the life-time of the ancestor, so as to bar the estate-tail or remainders, or do more than bar themselves by estoppel.

‘Sometimes this assurance is used as a means of barring a title of dower (*k.*), or aliening the freehold or inheritance, or some other interest of a married woman (*l.*); but it is never, at least among correct practitioners, used for these purposes, unless one of the objects of the assurance is to bar an estate-tail. It may also operate as a conveyance by a person who has an estate of inheritance, not being an estate-tail (*m.*) It may extinguish a collateral interest, as a rent; or a lien, as a judgment; or a power, as a power of jointuring (*n.*), or of appointment (*o.*), or of charge (*p.*), or to bring a writ of error (*q.*).

‘In these particulars it partakes, according to the circumstances, of the nature and operation of a conveyance, or of a release; and sometimes it operates merely by way of estoppel or conclusion; and in these instances it must be considered as such conveyance, release, or estoppel, rather than a common recovery, requiring the forms of a real action; and in this place it may be observed that the issue in tail, or those in reversion or remainder, not being parties, are not bound by estoppels or conclusions. Tenants in tail may bind themselves by estoppel as well as the

(*f.*) *Smith v. Farnaby*, Carter, 32. Siderfin. 285. *Weeks v. Peach*, Lutw. 1218. (*g.*) *Smith v. Farnaby*, and *Weeks v. Peach*, already cited. (*h.*) 2 Roll's Abr. 394, b. l. 40. Raym. 29. (*i.*) *Pigot on Recoveries*, 129. Sid. 202. (*k.*) 2 Co. 74, 78. 10 Co. 43. *Eare v. Snow*, Plow. 504, 514. Pig. 67. (*l.*) *Ib.* and *Inledon v. Northcote*, 3 Atk. 430. (*m.*) 3 Co. 5. Pig. Rec. 123. *Webb v. Hill*, Cro. Eliz. 21. *Lockyer v. Pallreman*, Style, 309. Pig. 198. (*n.*) *King v. Meling*, 1 Ventr. 293. 2 Levinz. 58. Pig. Rec. 136. (*o.*) *Penn v. Peacock*, C. T. Talb. 41. (*p.*) *Duke of Chandos v. Talkot*, 2 P. Wms. 605. *Stville v. Blackett*, 1 P. Wms. 777. (*q.*) *Barton v. Lever*, Cro. Eliz. 313. Moor, 365.

owners of other estates. As recoveries do not operate by estoppel against the issue, or those in reversion or remainder, a recovery suffered of the *land* will not bar an intail of a *rent* issuing out of the lands, as far as the issue, or those in remainder or reversion, are interested. But a recovery suffered of the *land* by a tenant in fee or for life of a *rent*, would *quoad* his estate, extinguish the rent; and suffered by a tenant in tail, will bind himself. Nor will a recovery suffered by a person who has a contingent or executory interest in tail, either under a contingent remainder or executory devise (*r*), bar the intail or remainder; and yet suffered by a person who has an executory interest *in fee*, it will, by way of release or estoppel, bar his interest; and this estoppel will bind the person by whom the recovery was suffered, though he had an interest in tail.

‘ When one estate-tail is derived out of another estate-tail, both estates-tail, or the right to both these estates, may centre in one and the same person: and in that case a recovery suffered by him, in which he shall be *vouched*, and *vouch over*, will bar both estates-tail (*s*), and consequently will confer an estate co-extensive with the ownership of the person by whom the original estate-tail was created. But a recovery suffered by him in which he shall be named tenant (*t*), and *vouch over*, will bar that estate only of which he is actually seised, without affecting the title under the original estate-tail. Sometimes, however, the original estate-tail may be revived; and the derivative estate-tail be defeated through the medium of the doctrine of remitter (*u*). Under these circumstances the title is to be considered precisely on the footing of the original estate-tail; and a recovery suffered, so as to bar that estate-tail, will enlarge the ownership into a fee-simple; admitting the fee-simple was in the person by whom the original estate-tail was created. From these observations it will be collected, that when there are two estates-tail, and one of them is derived out of the other, and both subsisting in different persons, the owner of the original estate-tail must be a party to the recovery in order to gain the title to the *fee-simple*; and to bar both estates-tail, both tenants in tail must be *vouched*. Whether they are to be *vouched* jointly or severally will be considered in that division in which the necessity of a recovery with treble voucher will be the subject of observation.

‘ An assurance by common recovery generally consists of two parts perfectly distinct:—

‘ 1st, Of the recovery which assumes all the forms of a real action, and is founded on the supposition of an adverse claim; and,

(*r*) Pigot on Recoveries, 133. (*s*) Manxell's case, 2 Plow. 8. p. 3, Co. 6. (*t*) Taltarum's case, 12 Ed. IV. Pig. on Rec. 9. Bro. Abr. Tail. 32. (*u*) Litt. s. 659, 660. Co. Litt. 347, b. 14.

* 2d, Of the recovery deed, which is, in form at least, partly a preparatory step to suffering the recovery, and partly a declaration of the uses of the recovery when suffered. Notwithstanding the recovery assumes the form of a real action, it is considered merely as a common assurance, and the courts take notice of it as such.(r)

* There are a variety of cases in which a common recovery is the only assurance which will complete the title. For example : a person who is tenant in tail, with remainders and reversions over to other persons, cannot, by his own act, and *ipso facto*, bar those remainders and reversions by a fine, or by any other means than a common recovery. These interests may be eventually barred by non-claim (x), on a fine with proclamations; or by the statute of limitation (x). This is by force of certain statutes, not of the direct operation of the assurance.

* Also a tenant in tail, subject to a springing or shifting use, or conditional limitation, as an executory devise, cannot, even though he has the remainder or reversion in fee, bar this springing or shifting use or conditional limitation by any other means than this assurance : and, as will be collected from a former observation, tenant in fee, subject to an executory devise or conditional limitation, &c. cannot, by a common recovery, or by any other means proceeding from himself, bar such executory devise or conditional limitation (y).

* And wherever tenant in tail has also the immediate remainder or reversion in fee, *by descent*, though *prima facie* a fine would enable him to acquire the fee-simple in possession, and render his title, unless it can be impeached, marketable(z), it is his interest, except in very particular circumstances, as apprehension of death, &c. before the term, to suffer a common recovery rather than levy a fine. By means of the recovery his title will depend wholly on his estate-tail, and the remainder or reversion in fee will be immaterial to the further deduction of the title (a); while if he levies a fine, he will bar his estate-tail, convert the same into a base or determinable fee, and this fee will merge in the remainder or reversion in fee-simple, and all the charges and incumbrances (as judgments, annuities, &c.) affecting the reversion or remainder in fee, will be accelerated and become an immediate instead of being a remote charge on the possession. So also tenant in tail having the remainder or reversion in fee by descent, will become immediately chargeable with the debts of the ancestor, who was the owner of the remainder or reversion in fee-simple. Thus these incumbrances instead of being barred,

(v) Pelham's case, 1 Co. 14, b. 3 Bl. Com. 451. Pigot on Recov. 25.
 (w) H. 8. (x) 20 Ja. 1. c. x. (y) Pells v. Brown, Cro. Ja. 590.
 (z) Spelling v. Trevor, 7 Ves. jun. 497. (a) Tracts on Cross remainders, &c.

as they may be by a common recovery, will become an available charge.

‘ On this subject the student should read the cases of *Symonds v. Cudmore* (b), *Kynaston v. Clarke* (c), *Shelburne v. Biddulph* (d), and also the observations in the tracts on cross-remainders and alienations by tenants in tail, with great attention.

‘ On the effect of common recoveries in barring remainders, conditions, and collateral limitations, the cases of *Page v. Hayward* (e), *Gulliver v. Shuckburg Ashby* (f), *Driver v. Edgar* (g), and *Benson v. Hodson* (h), should be closely studied.

‘ On the authority and reasoning of the determination in *Symonds v. Cudmore*, *Kynaston v. Clarke*, *Shelburne v. Biddulph*, it should be understood as a general, rule to be observed in practice, that a tenant in tail, who is merely tenant in tail, or who has the reversion or remainder in fee by descent, should suffer a common recovery, in preference to levying a fine; and even if he levies a fine, so as to guard against the accident of his death before the commencement of the term, the fine should be levied for the declared purpose of making a tenant to the writ of entry, and to the intent of suffering a common recovery: so that the fine and common recovery, if one shall be suffered, may form part of the same assurance (i), and thus prevent, as it is apprehended they will do, the merger of the ownership under the estate-tail, in the reversion or remainder in fee; or, in other words, make the title wholly dependant on the ownership under the estate-tail.

‘ And in some cases, especially when there are heavy debts, or there is the apprehension of judgments, &c. affecting the reversion or remainder in fee, and a fine is to be levied, it will be a caution well worth the expence, previous to levying the fine, to make a demise for years, to be created in the name of a trustee, upon trust to attend the inheritance, and to protect the possession during the continuance of the ownership under the estate-tail; for the term being supplied partly from the estate-tail, and partly from the remainder or reversion in fee, will not be affected by the subsequent merger, should it take place, of the estate-tail; but would protect the possession during the time of the estate-tail, viz. till the failure of the issue inheritable under the estate-tail.

‘ The demise generally used to prevent a forfeiture, in those cases in which it is doubtful whether the party is tenant for life or tenant in tail, and of which there is a form in the appendix, would, with very little alteration, answer this purpose; but it

(b) 4 Mod. 1, 2. Salk. 358. 1 Show. 370. (c) 2 Atk. 204. (d) 4 Bro. P. C. 524. (e) 2 Salk. 570. (f) 4 Burr. 1929. (g) Cowp. 370. (h) 1 Mod. 108. (i) *Ferrers and Curson v. Fermor*, Cro. Ja. 643. *Goodright v. Mead*, 3 Burr. 1703. *Sewin v. Selwin*, 2 Burr. 1131.

never occurred to the writer of these observations to remark that this caution has *ever* been adopted in practice.

** Observations on the Operation of Fines as distinguished from Recoveries.*

'To elucidate the remarks on the extensive operation of recoveries, as distinguished from fines, and to shew the application of those remarks to practice, a few general observations may be added in this place.

'It is quite clear that a tenant in tail, merely as such, cannot make a good title to the fee-simple without suffering a common recovery. A fine levied by him, and operating as a conveyance, will merely bar the estate-tail, and convert the same into a base or determinable fee (*k*); or if it operates by discontinuance, then a fee-simple will be gained: but such fee-simple may be avoided by the action of those in reversion or remainder; or they may be even remitted to their estate by operation of law: but when a person who has an estate-tail, with an immediate reversion in fee, levies a fine with proclamations, the effect of the fine will be to bar the estate-tail, and convert the same into a determinable fee, and this determinable fee will merge in the fee-simple. The consequences are, 1st, that the title depends partly under the ownership of the estate-tail, and partly under the ownership of the reversion in fee; 2dly, the reversion, having become an estate in possession, the possession is immediately chargeable with all incumbrances which affected the reversion or remainder in fee. For this reason it is considered a rule of practice, by all sound lawyers, that a tenant in tail, with reversion or remainder in fee by descent, should suffer a common recovery instead of levying a fine. And it certainly is the interest of every seller, who has a title thus circumstanced, to suffer a common recovery, rather than rely on the operation of a fine. It is also the interest of the purchaser, that a common recovery should be suffered, so that the evidence of the title may depend wholly on the ownership under the estate-tail, instead of being deduced, as it otherwise must be, as well under the ownership of the reversion in fee, as of the estate-tail. It is, however, now settled, by the case of *Sperling v. Trevor* (*l*), that a title, derived by means of a fine levied by tenant in tail, with the reversion in fee by descent, is, *prima facie*, good; and a purchaser cannot object to it for want of a common recovery, unless he can shew that the reversion

(*k*) *Macell v. Clarke*, 2 Lord Raym. 778. *Seymour's Case*, 10 Co. 95. *Doe v. Whitehead*, 3 Burr. 704. *Doe v. Rivers*, 7 Term Rep. 276. *Doe v. Wichelo*, 8 Term Rep. 211. (*l*) 7 Vez. p. 497.

in fee has been aliened or incumbered. However, though this shall not be shewn, he has a clear right to have a recovery suffered at his own expense. He has also a right, unless a recovery shall be suffered, to have the title deduced from each successive owner, who for the time being has been seised of the reversion in fee : and for this purpose to call for an abstract of the wills of such of them as have left wills affecting real estates, and for presumptive evidence of the intestacy (as letters of the administration or the like) of such of them as are alleged to have died intestate : and to satisfy a purchaser on these points will frequently be attended with more delay, and in general with more expence than a common recovery ; and for this reason, independent of the advantages which, in reference to the covenants warranting the title, arise to the seller from a recovery, it seldom, indeed very rarely among gentlemen of any experience, happens that a seller is advised to refuse a recovery, and place the title on the operation of a fine ; and in many cases, and indeed in all cases of considerable property, a recovery is attended with less expence than a fine.

The LAWS of GAMING, WAGERS, HORSE RACING, and GAMING HOUSES. By JOHN DISNEY, of the Inner Temple, Esq. Barrister at Law. 8vo.

WE fear there is such an ambiguity in the use of the particle *of*, in this and similar titles, which are for brevity's sake adopted by most authors upon legal subjects, as, in the present instance, to excite somewhat a ludicrous idea, and were we not acquainted with the design of the author by the proper addition of his profession, which he has subjoined to his name, we should probably have deemed this work wholly out of our province. We perhaps should have thought that the *laws*,* of gaming, wagers, horse racing, and particularly the *laws of gaming houses*, would not be an improper title for a new edition of *Hoyle's Games* with improvements. These improvements we should have expected to have been taken from *De Moivre*

* Law would have been perhaps less open to objection.

on *Chances*, the *Sportman's Magazine*, the *Laws of Billiards*, and the *noble game of cricket*, which latter we see hung up in billiard and country club-rooms, and such other regulations of propriety and decorum as have been established by the *Jockey Club*. This society we consider as having full and lawful jurisdiction upon all these subjects being the supreme *arbiter elegantiarum*, we were going to say, but we choose rather to substitute *alearum*; and to its inexorable decrees might be added such other laws as are found to prevail at the principal subscription houses, hazard tables, and *gaming houses*, public and private, in this great and wicked metropolis:

'How throws the *caster* how the *set ter sets*,
What chance one has to win the other's bets.'

we might have thought properly within the title of the *laws of gaming and gaming-houses*; but we know Mr. Disney to be no frequenter of those lewd haunts. He is, truly, not a sportsman nor a gambler, but a very respectable gentleman at the bar, and we trust will excuse us for sporting a little with his title-page. For we really have so little amusement in wading through the *ponderous tomes* of law, which we are often compelled to examine, that for want of better food we are become almost as keen after a particle misplaced with a ludicrous effect, as a *country squire* is after a poor inoffensive *hare*, whom he has driven from her form with the barking of hounds, and the yelling of biped terriers, otherwise huntsmen, and we believe with quite as good reason, namely, the want of better amusement.

Of his motives for undertaking the present publication, the author gives the following account: 'Not having been able to find any work of a similar nature to the present, and as the subject is very generally interesting, the author has been induced to put together the following sheets. It has been his object to avoid, as much as may be, technical terms, in order to render the book as generally acceptable as possible; endeavouring at the same time to make it a useful compendium to the profession.'

That it will be found absolutely necessary to the profession, we have some doubt; and we fear, that, unless it be so, it will have little hope of being generally considered useful. But as the author has compressed into his work all the

little that is to be found in the law books, concerning the subject ; and as there is a great desire amongst the profession to accumulate treatises upon every individual title of law, we hope it may be found at least equally useful with some others which are not deemed of the highest degree of importance. And, with respect to persons who are not professionally skilled in the law, and may deem it necessary to consult any books on the laws concerning wagers, and the laws against public gaming houses, we think they, at least will be indebted to Mr. *Disney* for affording them a safe guide, by a regular treatise upon the subject, instead of resorting to the crude indigested trash which they might pick up from the catch-penny publications of those who are ever in wait for ignorant avidity and eager necessity.

The author distributes his subject under the following heads :

Of wagers which are legal and those which are not—Of the stakeholder—Of horse races—Of games—Sect. I. Of games which are legal and those which are not—Sect. II. Wherein is considered in what manner the law treats accidents and deaths which happen in the course of athletic games or exercises ; and how deceitful and fraudulent gaming is punished—Of money lent to play with, the securities given for money so lent, and money won—Of public gaming houses.

And he has explained his plan, and the nature of the information, to be found in the work so amply in an introductory chapter, that we shall, we hope, fully satisfy our readers of the nature of the work by inserting it.

‘ Generally speaking, it is in the power of every man to contribute something towards the good of mankind. Professional men, and men of literature or science, have it in their power to exercise this duty by the diffusion of that knowledge in which they are supposed to be more particularly conversant. Under this idea, I have employed some time and industry on the present work, not without advantage to myself in my professional studies ; and, I hope, not wholly unprofitably to others : and have appropriated part of my plan to a general consideration of the subject, in order to render my labours more generally interesting and serviceable.

‘ Gaming is so destructive to the happiness of society, and so subversive of the comfort of individuals, that every friend to good morals must wish, as far as it may be found practicable, the entire eradication of it.

‘It is with a view to this eradication that laws, in almost every state and every age, have been made, inflicting either disgrace or punishment on the gamester. And here I will introduce the consideration of the laws of our own country, by a short review of those of other nations in remoter ages. Amongst the Jews, a gamester was excluded from the magistracy, and was rendered incapable of being chosen into the greater or lesser Sanhedrim; nor could he be admitted a witness in any court of justice till they were perfectly reformed. By the laws of the ancient Egyptians, a gamester being convicted (whom any one might accuse) was condemned to servitude in the quarries. The Roman *Ædiles* were authorized to punish gaming; and this authority was suspended only during the *Saturnalia*: a time of general mirth and freedom, when a latitude was given to licentiousness. By a particular law, distinguished by the name of *Lex Cornelia de Lusu*, playing for money was prohibited amongst the Romans; and its near analogy to our law is very striking: it runs thus: “that no person shall play for money, or upon trust, or security given for it, unless in games of exercise, such as quoits, throwing the javelin, or the ball—running, leaping, wrestling, or the like, which tend to courage.”—See *Rosinus’ Roman Antiquities*, book 8, ch. 31.

‘Justinian, in an authentic to one of the *Pandects*, takes notice of gaming thus, where the analogy is very strong between the Roman law and our own on the same subject: indeed, it is not improbable that this may be the foundation of our present statutes.

‘This difference, indeed, is observable; that, while the Romans permitted games of wrestling and pugilism, and excepted them from the penal laws against gaming, ours prohibits them with one and the same rigour; and this arises, probably, from the modern manner of raising armies, and modern mode of making war. The law to which I refer, is as follows:—“*Commodis, igitur, subjectorum prospicientes, hac generali lege decernimus, ut nulli liceat in publicis, vel privatis domibus, vel locis ludere; neque in genere, neque in specie.*” *Codex*, lib. 3, tit. 43. *de aleatoribus*.

‘The Roman Emperor also complains of persons playing at night and day for gold and silver, and even for their trinkets and ornaments of precious stones. The sum also to be played for, it is stated, was not to exceed a *solidus*, a piece equivalent to, or nearly of the value of, twelve shillings English. Persons who, by their presence, countenanced gaming tables, were as punishable as those who played, though they did not take part in the game. There is, in the laws of Justinian, a distinction, in point of criminality, made between the clergy and laity in respect to gaming; our law considers them as common persons, and puts them, as to this matter, on the same footing; but the general voice of mankind has very justly fixed a deeper stigma on the misconduct of the clergy than on other persons, because their very profession pre-

supposes the exercise of moral duties, in conformity to their own instructions. Money lost at play could not be legally recovered by the winner; and money paid might have been reclaimed by the loser. If he neglected such claim, his heir might sue for it; or, in case of his default, the defensor of the city; or it might be recovered to the use of the exchequer or state-treasury, within fifty years.

'Mortgages and securities for the payment of money lost at play, were all considered invalid and nullities. Compelling, or enticing any one to play, was punishable with fine, imprisonment, and hard work in the quarries. By the Prætorian edict, using force to make a man play, was punishable in the same manner: and, Menochius, the commentator on this law, says, that though the text only speaks of force, it will hold good also in the case of persuasion. The master, or father, had, according to Paulus, a remedy against any one who induced his son, or his servant, to game. And, as a check to those who kept gaming-houses, it was not allowed them, by the same Justinian code, to maintain an action against any one who had beaten them, either at home or abroad; and, if they kept false dice in their houses, the house was forfeited to the state, if it belonged to the offender; and the same if another's, provided the owner knew it to have been used for gaming.

'The Eastern code of the *Basilika* was founded on this *Alcarnus* *Usus* of Justinian, and, indeed, almost a literal copy.

'The laws of the Franks and Germans seem more particularly pointed against this vice in the clergy; and punished them for it by deprivation and excommunication.

'The Koran prohibits games of hazard, as abominations, and tending to the sowing of dissensions and horrors amongst men.

'Thus the legislators, in almost all ages, have considered gaming as a vice of importance, sufficient to excite their attention and to warrant strong penal laws to suppress it. It is the same with us. Those laws, are, indeed, very seldom put into execution; very seldom, in comparison with the number of instances in which they are broken. The laws of the land, however, which are founded in morality are not of less force than the laws of honour. "Here, too, we may note this excellent man's (Mr. J. Foster) opinion upon that punctilio of honour; by the rules of which some men affect to palliate, and others to justify, crimes of the blackest dye, the grossest frauds, gambling, seductions, adultery, murder. Such was and is the law of honour: and no man, who will attend to the subject can doubt of it."*

This latter description of law is so prevalent, and uncontrol-

* Mr. J. Grose's Judgment, in the King v. Rice, 3 East R. 623.

led in society, that, where it obtains, it will prevail. Dr. Paley defines it to be, a system of laws constructed by people of fashion, and calculated to facilitate their intercourse with one another, and for no other purpose. However, it is not wholly without its uses, inasmuch as it keeps society together; and, in some few cases, enforces the laws of morality; and, we can only regret, that all its demands do not coincide with the moral duties of mankind. It is a rule pretty generally acknowledged in laws of play, *that one side ought not to have any advantage over the other*; and on this it is very fairly remarked, that "it is neither practicable nor true;" and the same author solves the meaning of it to be, "that neither side have an advantage, through means of which means the other is not aware." This, I think, may be considered as allowable by the laws of honour: for, it is physically true, that both sides cannot be equal in skill, judgment, or management of temper; and not offensive to the laws of morality, because no deceit is practised.

'The reflection of Mr. J. Blackstone on gaming, has much force:—"Next to that of luxury, naturally follows the offence of gaming, which," says he, "is generally introduced to supply, or retrieve, the expences occasioned by the former; it being a kind of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and, therefore, they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer."

'Among other species of gaming, may be ranked the Lottery: and, though our laws are severe against this vice in general, and when practiced between individuals, yet do they sanction it under this particular shape; and that, simply, because it is productive to the revenue. It is not my design to comment upon the laws as they relate to Lotteries; I leave them to the reflections of every man who is acquainted with their nature and effect. The following pages have been compiled for the use of all whom they may concern, or to whom they can apply. It may be of some use to the lawyer, by saving him the infinite trouble of looking for cases: it will also be useful to the private gentleman, in shewing him in what light the law of his country regards as vice so destructive of every moral duty.

'Horse-racing is, indeed, more favoured by the legislature than many other species of play; because the breed of that very useful animal is much improved by the attentions necessary to fit him for the course: but this is regulated by restrictions, to prevent an excessive increase of it.

'Of the division of these pages, it will be necessary to say something. I have endeavoured to make it sufficiently copious and minute, without branching it out into unnecessary ramifications.

'The consideration of what wagers are lawful, and what are

not so, is the object of the First Chapter. A wager, or bet, is a sort of gaming; and, undoubtedly, bears a near relationship to it; it is attended with some difficulty to define what it is, so as to distinguish it from other gaming. Dr. Johnson says, it is "any thing pledged upon a chance or performance;" but it seems to include this additional circumstance, that the person laying the wager should not be concerned in the performance; as *A* lays a wager with *B*, that *C* is older than *D*; this seems to be a wager, properly so speaking. Yet we say,—I lay you a wager of so much, that I can run six miles in an hour: here the layer of a wager is an actor in the trial which is to decide it. We also say, "I lay a wager with you, that I can run faster than you;" here both are actors in the means of deciding; yet it is called a wager.

'In the Second Chapter is considered the situation of the person into whose hands the money, to be paid to the winner, is deposited; who, in technical language, is called the stake-holder; and, being a person uninterested in the event of the bet, is the guardian of both parties concerned. This I thought deserving of a distinct Chapter, as he bears relations wholly different in almost all cases to any other person concerned.

'The Third Chapter is occupied by the consideration of the peculiar sport of Horse-racing. As this is so important a subject in this country, and so much attended to by the first characters for rank and fortune, I should conceive it to have been unpardonable to have given it less consideration than I have done. It is, in some degree, distinguished from any other species of sport by the consequence to which it has risen; and it claims our notice, and some indulgence, as the nursery for the improvement of the breed of one of the most useful animals in the creation. And, for this latter reason, it has been peculiarly favoured by the legislature, as appears from the preamble of the statute of 13 George the Second.

'The next Chapter, the Fourth, will shew what sports or games are allowable, and what are discountenanced by the laws.

I have appropriated one distinct Chapter (the Fifth) to the consideration of securities given for money lent professedly to play with, partly, because the legislature have considered it of sufficient importance to enact a law particularly levelled at such securities; and partly, because many men may be led, through ignorance of the law, inadvertently to give, or join in these securities. The law itself, on these points, is perhaps more difficult to distinguish correctly than on any other part of the subject.

'The Eighth Chapter treats of the nature of public Gaming-houses, which are, indeed, more properly objects of criminal than civil process;—nevertheless, I conceive some particular notice should be taken of them.

Considering public Gaming-houses as the receptacles of misery and the nurseries of vice, the law has been more severe against them, and the persons concerned in them, than against any other attendant circumstances of our subject. On this account Gaming-houses and the keepers of them are subjects of indictment; that is, they are required to make atonement to society for having committed a crime. The subject, therefore, is treated in a different light from any preceding; for, instead of considering the principles of retribution for an injury, we have, in this case, to consider how punishment is to be inflicted upon the crime; which constitutes the great distinction between the civil and criminal part of our law.

‘In my Seventh and last Chapter, I have selected many references to forms of pleadings in cases of Gaming and Wagers, and also the points which have been determined upon questions of pleading, in these cases, by the Courts of Westminster-Hall. This Chapter will, therefore, be considered as more peculiarly adapted to the use of gentlemen in the profession; and to them it is now more particularly submitted. This collection of Cases and Pleading, as most things of this kind are, must necessarily be imperfect; my endeavours have been to make it as useful as my present reading and observation will enable me.’

In this introduction there are some defects, which are almost too obvious to be noticed. We cannot, however, help regretting, that Mr. *Disney* should be so inattentive in a first production, as to introduce, in his very first sheet, after some rather unconnected observations upon the punctilios of honour, this very sage remark: that ‘this latter description of law is so prevalent and uncontrolled in society, that, where it obtains it will prevail.’ In a long work we overlook many faults; in the history of a ten years’ siege *Homer* himself might slumber; but we cannot allow Mr. *Disney* this poetical licence when he is writing an introduction of a few pages.

A Treatise on the Law of Obligations or Contracts by M. Pothier. Translated from the French; with an Introduction, Appendix, and Notes, illustrative of the English Law on the Subject. By Wm. David Evans, Esq. Barrister at Law. 2 Vols. Butterworth.

MR. EVANS having annexed to his work a Memoir of Pothier, by a French author, we shall insert an account of him, which we have compiled from a very long and elaborate elege, pronounced after his decease, before the University of Orleans.

MEMOIRS OF POTHIER.

M. Pothier was born on the 9th of January, 1699, at Orleans, where his father was counsellor and presidial. His constitution was in its youth extremely feeble; but he strengthened it by that temperance which accompanies well-regulated habits of study. He lost his father at the age of five, and according to the author of the elege pronounced, upon his decease, in the university of Orleans,* had no resources for his education but within himself; from which, it should seem, we are to understand, not that he was left an orphan destitute of the means of procuring instruction; but that the college of Jesuits, in which he was placed, 'was very feebly supported;' and he derived, like all men who are born to extend the sphere of science, little assistance from the lectures of the professors; but having acquired early, a large fund of general erudition, and possessing a happy memory and a ready perception, greatly outstripped his instructors, and became a master while he was yet a scholar. Although he thus acquired a taste for letters, he suffered it not to interfere with the study of the law, to which he seriously devoted himself; and in which, having graduated at Orleans, he was received a counsellor of the presidial in 1720, and, somewhat out of the regular course, was the first magistrate of the bailliage of Orleans, who exercised the right of giving an opinion upon the cases which they are appointed to report, while under twenty-five years of age. But the trammels of custom are made only to be

* M. Le Frogne, King's Advocate in the presidial of Orleans.

broken by the vigour of uncontrollable genius, and 'never,' says his eulogist, 'was a deviation made from the general practice with greater advantage.'

During the first ten or twelve years, he studied theology, together with law, in the works of St. Augustin and the members of the Port Royal; and was long accustomed to perfect the knowledge which he acquired from practice and study, by colloquial discussions with an advocate of great erudition, with whom he frequently conversed in Italian for the advantage of improvement in that language.

He soon became celebrated for his knowledge, and, as his method was to compose a treatise upon each subject of the law which he studied, he saw and endeavoured to remedy the defective course of reading then in use; by endeavouring to give a new arrangement to the digest, with such corrections, as, from a frequent comparison of the discordance of many parts of the text, it appeared to require. This was the source of his long labours and his future fame, and gave birth to his work, which was afterwards completed in three volumes folio, entitled, *the Pandects of Justinian digested in a new Order*.

The abridgments of the Roman law made under the authority of Justinian, and which are now the only authentic remains of that grand and beautiful structure of practical jurisprudence, were long perceived to be defective. That which it had taken ages to bring to perfection, by the accumulated labours of the most able prætors and jurists of the proudest ages of eloquence and of freedom, of the arts and the learning of the Romans, under her consuls and her first emperors, and which was founded too on the earlier science of the Grecians, from whom the 12 tables were, originally, derived, was by the hasty pen of Tribonianus a jurist of a corrupted age, in the latter days of the Roman empire, reduced, from an immense mass, into a more concise, but scarcely less confused and irregular form, in the course of three short years. The vast variety of comments which former jurists had left, extending as it is said to 2000 volumes, were become unwieldy; but, in practical science, variety and extent afford certainty and intelligence, while brevity but too often leads to obscurity. Thus it was with the Pandects. In the rapidity of compilation, the most important passages

of the most useful texts were frequently omitted or corrupted; and some laws were permitted to remain under different heads, which formed direct contradictions or, according to the affected phraseology of the French eulogist, plain antinomies to each other.

In this work he was greatly encouraged by the celebrated Chancellor d'Aguesseau, who with the generosity of congenial talents, and transcendent genius, having been shewn a part of his work *De Solutionibus* by M. Prevot de la Janés, an acquaintance of Pothier, exerted himself privately as a friend, and publicly as a patron of our jurist, in furthering his plan, and promoting the success of his labours. From a letter of the Chancellor, dated January 10, 1746, it appears that he had himself formed some particular views concerning the two last titles in the digest, *De Verborum Significatione* and *De Regulis Juris*; and with his assistance Pothier so greatly augmented these titles, and particularly the latter, which he made to comprise an ample compendium of the whole law in 275 pages folio, that he had himself some intention of publishing them separately, but was dissuaded from his purpose by the chancellor, who appears to have taken an extraordinary interest in the publication. He also received great assistance from the labours of M. de Guienne, and from the advice of M. Rousseau, an advocate and professor of law at Paris. His work was not completed till after 12 years of labour, and perhaps an equal period in preparation for its commencement.

Thus introduced to the chancellor, and laying so strong a foundation for professional reputation, it was to be expected that he would soon reap the fruits of so advantageous a connection; accordingly in 1749, upon the death of M. Prevost de la Janés, without solicitation, to which he was ever too proud, and too diffident to submit, he was appointed to succeed him in the professorship of French law, at Orleans. For this situation he was most happily adapted; he had a natural benignity which delighted in the communication of knowledge, and was never so well pleased as in the care of instructing the young; he possessed also a felicity of manner in conveying instruction, which, as his works evince, could not fail to arrest the most wandering attention, and force itself upon the least tractable mind. Like Socrates he often instructed most when he seemed least to attempt it; and

by a happy question put to his pupils on the sudden, kept alive their attention, and led them, seemingly of their own accord, to the discovering of that knowledge which they fancied that they already possessed. He thus often lost the superiority of the master in the condescension of the friend; and was no less beloved than respected by all his pupils. Their improvement seems to have been the fondest wish of his heart, so that he devoted a part of his salary to the institution of prize medals for public disputations, and the remainder to the service of the poor.

After completing his great work on the *Pandects*, Pothier began a course of labour which terminated only with his life, and placed his fame beyond the reach of mortality. He had formerly, for his own private use, composed treatises on all the subjects of the French law, and was led by the duty of instruction, to revise them anew, so that he left behind him a vast number of the most useful treatises in manuscript, which, the shortness of life, and the length of art, alone precluded him from preparing for the press. In 1747 he had published, together with M. de Prevost de la Jarés, an edition of the Custom of Orleans with notes. It is to be observed, that in France, although the Roman law chiefly prevails, yet every province has its peculiar customs which are of paramount authority, and which form the common law of the district. In these customs it does not always happen that the authoritative dogmas of the law are founded upon principles derived immediately from reason; they are rather positive rules of arbitrary institution, and to reconcile them, to shew their connection with real justice, is the work of an extensive discrimination and a patient inquiry. Pothier possessed these qualities in an eminent degree, and having been requested, after the death of his friend, to correct a new edition of this production of their joint labours, he revised it with such care, and with so earnest a spirit of improvement, that he rendered it a completely new work, by adding instead of notes, a summary and connected treatise to each title, which formed the most satisfactory and the most luminous of comments.

In 1761 his celebrated *Treatise on Obligations* in two volumes. In this work which was only the commencement of a long series of various treatises on all species of contract,

and of which he afterwards published one every year, he treats of contracts in general with a perspicuity of arrangement, a profundity of research, a subtlety of discrimination, and a simplicity of manner, which affords the clearest elucidation of a most difficult and useful science, and is at once, not only a clear exposition of municipal law but a beautiful system of moral duty. For as he himself seems to have thought the complete jurist is often a more perfect teacher of practical ethics than the theologian. He can often when treating the sublime science of the Roman law elevate himself above the tribunals of human authority, and pronounce with rectitude upon the rights and duties of mankind, even in cases where human justice cannot reach ; and there is this happy excellence, in the system of that jurisprudence which has been the product of so many ages of study, that it inculcates a morality which affords no opportunity of yielding to the interests and passions of men, and yet alarms not their conscience with restrictions of too rigid severity and too difficult perfection.

He died, after a very short illness, which seemed to threaten but little danger, at the age of 73. His works, besides the Digest and the Customs of Orleans, are comprised in 24 volumes small octavo, and consist of treatises on all species of contracts. They are in the hands of every scientific jurist on the continent, and are frequently referred to even in this country. The treatise on insurance has greatly assisted in the improvement of our own laws upon the subject ; the treatise on bills of exchange has been referred to in more than one work upon the same subject in England ; and that upon obligations, or contracts in general, to use a phraseology more german to our English habits, is now translated by Mr. Evans with comments and illustrations.

To give a catalogue of the works of a recluse scholar is to state the principal events of his life ; for science can only be cultivated in tranquillity, and the more fertile is he in the products of his study, the more uniform is his course : his days are peaceful, his labours are incessant, his constancy is unvaried ; he passes through like the sober matron of a family, who every year adds to the number of her progeny, who delights not in the brilliant eclat of public attraction, engages not in the subtle

mazes of intrigue, to gain a delusive and painful celebrity, but lives retired, descends to her grave in peace, and leaves her offspring to perpetuate her name, and to be the pledges of her duty and her integrity. Of this character was the life of Pothier, he was wedded to science alone, and, in order to devote himself the more steadily to his pursuits, he avoided matrimony. He was above all other passions than that noble and tranquil ambition which, devoting itself to the duties of a liberal profession, distinguishes its possessor in proportion only as he becomes useful to his fellows, and despises all fame but that which is the unavoidable consequence of a life well spent in the performance of active and beneficial exertions.

In his person he was tall, in his gait and manners awkward to an extraordinary degree. This latter particular, as we may collect from the attempts of his eulogist to conceal the extent of it, for he declares that it was almost necessary to cut his meat, and that he could never succeed in mending the fire, although he made frequent attempts even upon his knees. It may appear a trifling remark, but it fixes the character of Pothier as one who was too intent on the cultivation of his mind and the improvement of his science, the law, to direct his attention to externals; and we the more readily believe his eulogist, when he describes him as a man of the most perfect simplicity of character, of the greatest purity of heart, of a charity scarcely restrained by the dictates of common prudence, and of a generosity wholly disregarding of self interest. He lived so entirely for his country, his friends, and his profession, that although the simplicity of his life, never permitted him to exceed his annual revenues, his expenditure, the least part of which must have been devoted to his own comforts, was always equal to his income, and he left his paternal estate where he found it. A female domestic was his steward, his housekeeper, his auditor, and his guide in every thing which concerned worldly prudence. To use a common phrase she was obliged to keep his purse in order to prevent him from ruining himself by his charities. One instance of his generosity is thus mentioned by his eulogist, and is highly honourable to both the parties concerned. "His satisfaction (at receiving the appointment of professor of law at Orleans), could only be diminished by the regret of having N. Guyot for an opponent and seeing him dis-

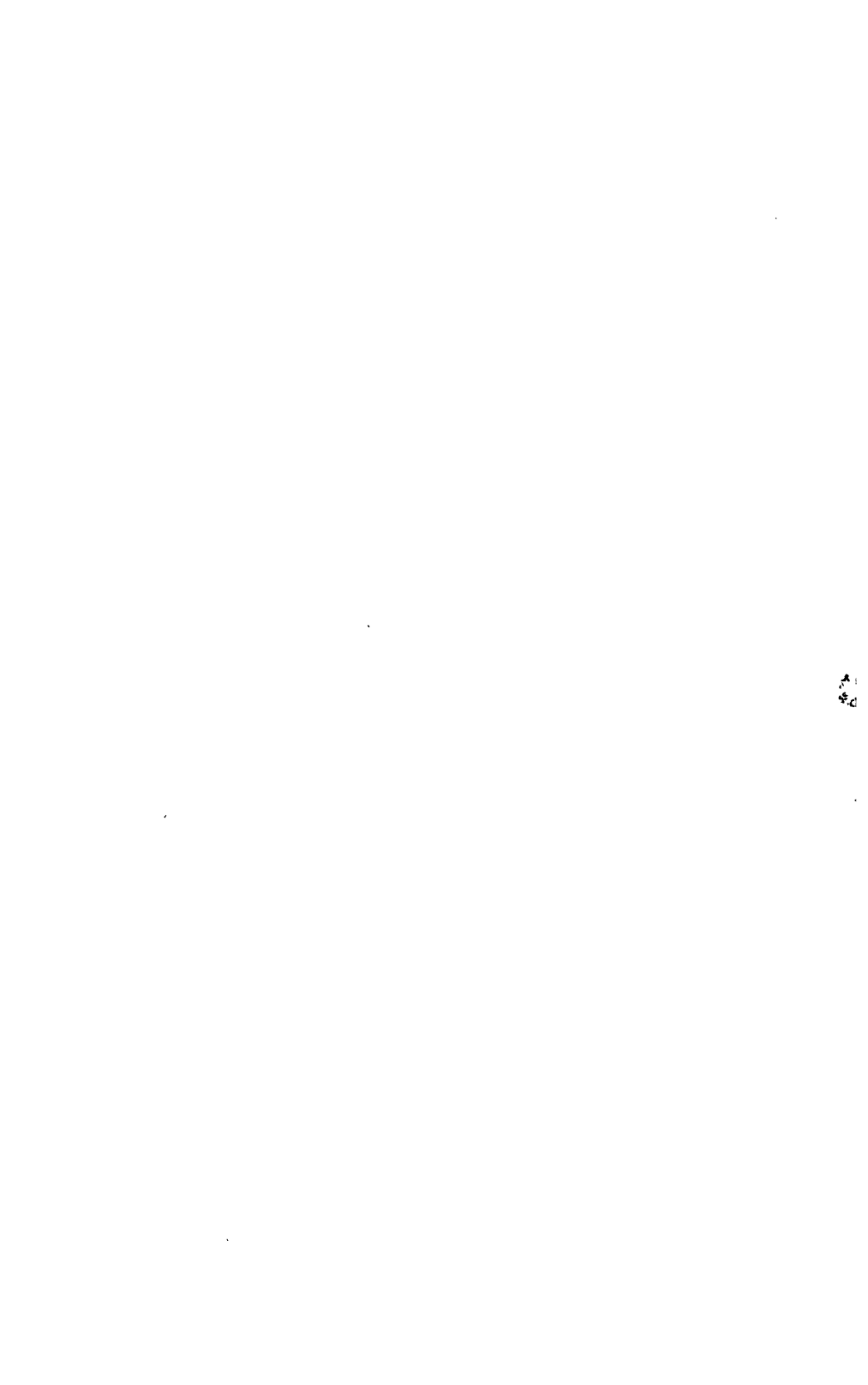
appointed of a situation, which he could not fail to have obtained against any less formidable competitor ! He, Pothier, had only wished for the appointment on account of the pleasure of communicating instruction; and he hoped to repair the failure of M. Guyot, by inducing him to accept the division of the emolument. A conflict of generosity passed between them ; Pothier pressed and solicited the division as a favour ; M. Guyot persisted in refusing it, and a few years afterwards received a joint appointment."

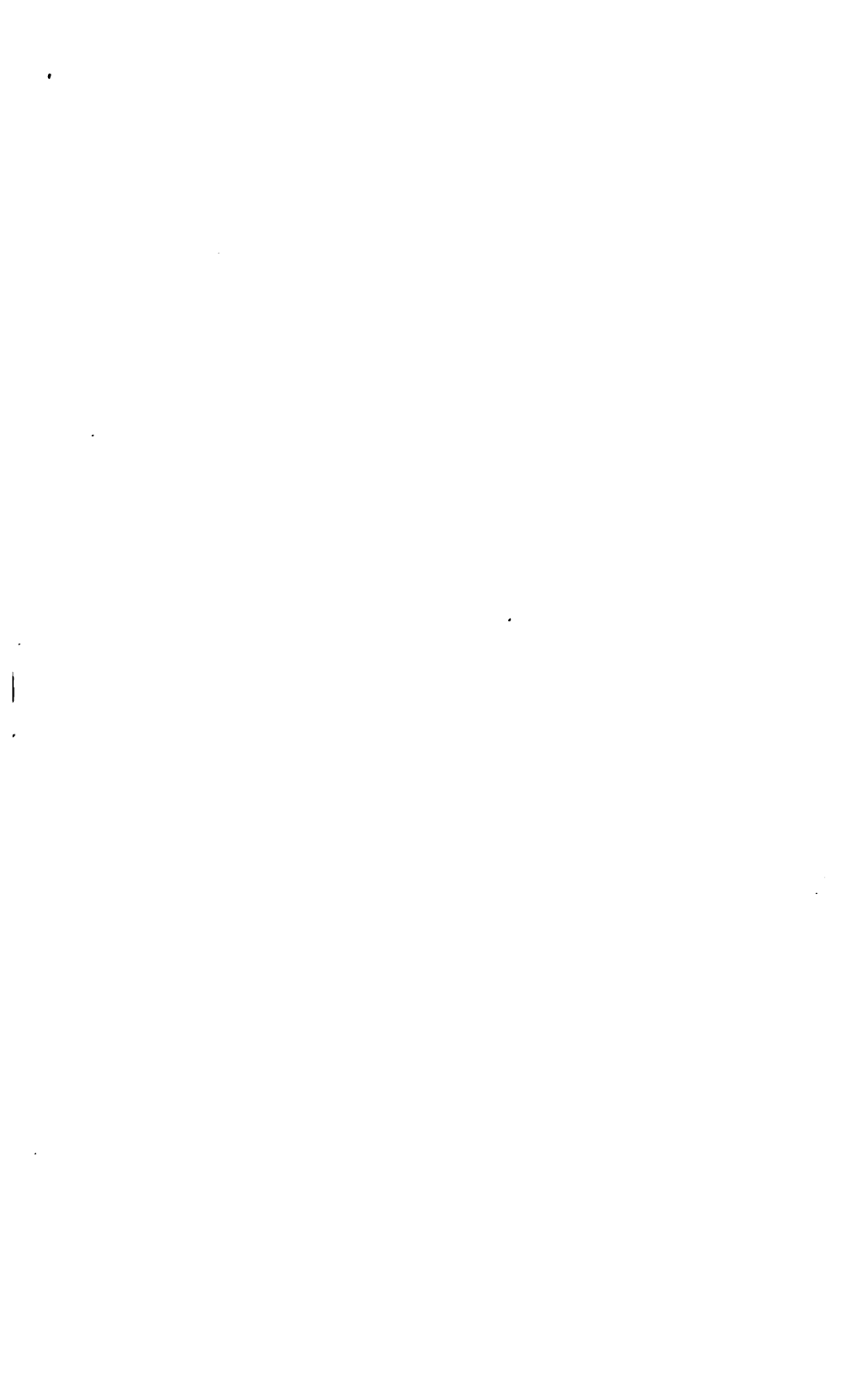
Although of a truly excellent disposition and not prone to controversy, yet he was, sometimes, eager in discussion rather irascible ; but being anxious only for truth, and not for victory, and being altogether unbiassed by prejudices, he was readily placable ; or rather, though warm and hasty in his expressions, he was almost incapable of giving or receiving offence. His manner in the execution of his functions as a magistrate was highly satisfactory : he was eager to know the whole of a case, but was at the same time so correct, and logical in his own views, that he often interrupted the advocates in order to confine or direct their discourse to the true point of discussion.

Living in a country where torture is sometimes allowed in criminal cases, it was not in his power to evade or repeal the laws ; but he did the utmost he could to shew his detestation of the practice. He avoided all interference in criminal cases, where it could be foreseen that the question might be directed. His eulogist says, he could not support the spectacle, ' a weakness which proceeds more from the sensibility of the physical organs than from moral sentiment.' Execrable sophist ! Weak, pusillanimous, temporising idolater of a system of oppression ! Nature cries aloud against the crime of torture, which levels the judge who orders it with the worst of criminals on whom it is inflicted, and makes justice itself odious and unnatural. Pothier can scarcely be accused of imbecility ; he who always acted from purity of sentiment without fear of opposition ; who spoke always the dictates of his heart, even glowing with humanity and kindness ; who lived not for himself but for posterity, and gave up all his labours, not to fame, but to utility. When such a man uniformly avoided all possibility of

being placed in a situation where the laws called upon him to inflict torture, shall we say, that his aversion was an act of imbecility rather than of reason? Far be from us and our readers the sentiment that shall thus transform a virtue into vice. No—we repeat, it was the cry of nature that pierced his heart; it was reason that gave force to his feelings, and seeing that he could not banish the practice from amongst his countrymen, he avoided it himself from principle; because he knew that where cruelty begins, there justice ends; that though severity may be an attribute of justice, she can never be associated with inhumanity. And here let us close his character. While his writings are the guide of every future jurist, let us learn to venerate the man who knew so well the limits of all human jurisdiction, who ascertained so perfectly what may be called the morals of jurisprudence, and who by his own practice, in a country where justice was so ill understood that torture was allowed, dared to pronounce in the most plain and least questionable manner, his detestation of a law, against which nature and reason alike rebel.

Mr. Evans has given a faithful translation of his author, with notes, containing a view of all the points in which the English law concurs with that of France. This, which is comprised in the first volume, we consider as a valuable addition to the library of the English lawyer. The second volume is chiefly composed of disquisitions by Mr. Evans himself upon some subjects in our laws, the greater part of which he has already published in the form of essays. We have not time at present to enter into a review of these essays, but shall only observe that although they evince much intelligence, they do not form a necessary appendage to such a work, while they greatly increase the price of it. We must defer our further opinion till a future opportunity.







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